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No. 910

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

WILBURN BOAT COMPANY, ET AL., *Petitioner*

v.

FIREMAN'S FUND INSURANCE COMPANY, *Respondent*

APPENDIX A, B, C, D, E TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1954.

Wilburn Boat Company, et al., Petitioners,
v.
Fireman's Fund Insurance Company.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February 28, 1955.]

Mr. Justice Black delivered the opinion of the Court.

This case raises questions concerning the power of States to regulate the terms and conditions of marine insurance contracts.

Glenn, Frank and Henry Wilburn, merchants in Denison, Texas, bought a small houseboat to use for commercial carriage of passengers on nearby Lake Texoma, an artificial inland lake between Texas and Oklahoma. The respondent Firemen's Fund Insurance Company insured the boat against loss from fire and other perils. While moored on the lake the boat was destroyed by fire. Following respondent's refusal to pay for the loss, this suit was brought in a Texas state court by the Wilburns and by their wholly owned corporation, The Wilburn Boat Company, to which the boat's legal title had been

transferred. After removal of the case to the United States District Court because of diversity, respondent answered admitting issuance of the policy, payment of premiums and destruction of the boat. Liability was denied however because of alleged breaches of printed policy terms or "warranties" providing that, without written consent of the company, the boat could not be sold, transferred, assigned, pledged, hired or chartered, and must be used solely for private pleasure purposes.[1] The case was submitted on stipulated facts supplemented by oral testimony. Contending that the evidence showed the policy contract to have been made and delivered in Texas, petitioners urged that all questions concerning alleged policy breaches were controlled by Texas law. If Texas law does govern, the policy provision against pledging may be wholly invalid.[2] Furthermore no breach by the insured of the provisions of a fire insurance policy is a defense to any suit under Texas law unless the breach contributes to the loss.[3] Without finding whether the

[1] "It is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged, without previous consent in writing of the assurer."

"Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by endorsement hereon."

[2] Vernon's Rev. Civ. Stat., 1936, Art. 4890: "Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

[3] Vernon's Rev. Civ. Stat., 1936, Art. 1930: "No breach or violation by the insured of any warranty, condition or provision of any

policy had been made and delivered in Texas, the court refused to give that State's law any effect at all, holding that since a marine policy is a maritime contract, federal admiralty law — not state law — governed.[1] The court went on to hold that there is an established admiralty rule which requires literal fulfillment of every policy warranty so that any breach bars recovery, even though a loss would have happened had the warranty been carried out to the letter. Finding that the Wilburns had breached policy provisions against transfer, pledge and use of the boat, the District Court entered judgment for the insurance company. Approving the District Court's actions in all respects, the Court of Appeals affirmed, saying that "It is the settled doctrine that a marine contract of insurance is 'derived from' is 'governed by,' and is a 'part of' the general maritime law of the world." 201 F.

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fire insurance policy contract of insurance, or application therefor upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

[1]The District Court said: "After much consideration of the above matter, I am of the opinion that the policy involved here is a maritime contract and therefore governed by the general admiralty law and not by the law of Texas, since the policy covered the possession navigable waters of the United States, without as well as within the State of Texas, and I find that the waters of Lake Texoma are navigable waters of the United States."

[2]There was evidence that prior to the loss the company had notice that the boat was constantly used for commercial purposes. Because of this petitioners urged that the company had waived the policy provision against such use and was also estopped to plead it. Questions involved in these contentions remain wholly open for consideration by the District Court in any new trial that may be had.

2d 833. Importance of the questions involved prompted us to grant certiorari. 347 U. S. 950.[6]

Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. *Insurance Co. v. Dunham*, 11 Wall. 1. But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. In the field of maritime contracts[7] as in that of maritime torts,[8] the National Government has left much regulatory power in the States. As later discussed in more detail, this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.

Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since in the absence of controlling Acts of Con-

[6]The Court of Appeals assumed that if any state law applied it was that of Texas. The question of the appropriate state law is not before us, however, and we express no opinion on that aspect of the case. Cf. **Watson v. Employers Liability Ins. Co.**, 348 U. S. 66. Likewise we are not concerned at this time with whether the District Court's holding that the Wilburns' transactions constituted breaches, and that the breaches had not been waived by the company would be correct hol lings under state law.

[7]See, e. g., **The Lottawanna**, 21 Wall. 558; **Madruga v. Superior Court**, 346 U. S. 556. But cf. **Union Fish Co. v. Erickson**, 248 U. S. 308.

[8]See, e. g., **Just v. Chambers**, 312 U. S. 383; **The Hamilton**, 207 U. S. 398. But cf. **Pope & Talbot v. Hawn**, 346 U. S. 406; **Butler v. Boston & Savannah S. S. Co.**, 130 U. S. 527, 557-558.

gress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. See, *e.g.*, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239. Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?

The only decision of this Court relied on by the Court of Appeals to support its holding that there is an established admiralty rule requiring strict fulfillment of marine insurance warranties was *Fire Insurance Co. v. Coos County*, 151 U. S. 452. There, because of a breach of warranty, an insurance company was relieved of liability for loss of a courthouse by fire, and this Court said it was immaterial whether the breach contributed to the loss. But no question of marine insurance was remotely involved nor was there any reliance on a marine insurance rule. Writing its own "general commercial law," as was the custom in diversity cases prior to *Erie R. Co. v. Tompkins*, 304 U.S. 64, this Court in the *Coos County* case simply followed a general doctrine commonly applied to warranties in all types of insurance.[9] A mere cursory examination of the cases, state and federal, will disclose that through the years this common-law doctrine, when accepted, has been treated not as an admiralty rule but as a general warranty rule applicable to many types of contracts including marine and other insurance.[10] There are very few federal cases on marine insurance in which

[9]See, e. g., **Phoenix Life Ins. Co. v. Raddin**, 120 U. S. 183, 189-190.

[10]See, e. g. cases collected in 87 A. L. R. 1071; L. R. A. 1918B 429; 34 L. R. A. (n. s.) 563; 11 L. R. A. (n. s.) 981; 29 Am. Jur., Insurance, § 529 **et seq.**

the strict breach of warranty rule has even been considered. And only two circuits appear to have thought of the rule as a part of the general admiralty law.[11] On the contrary, other circuit court decisions, including the ones relied on in those few cases holding the rule to be one of federal admiralty, seem to indicate state law was followed in applying the rule[12] or that the question was decided as one of "general commercial law," a uniform practice during the era of *Swift v. Tyson*, 16 Pet. 1.[13] This Court did say in one marine insurance case that warranties "must be strictly and literally performed." *Hazard's Administrator v. New England Marine Ins. Co.*, 8 Pet. 557, 580. But there is not the slightest indication that this statement referred to a federal admiralty rule and the Court in fact expressly followed and applied Massachusetts law to decide another question in that very case. Whatever the origin of the "literal performance" rule may be,[14] we think it plain that it has not been judicially established as part of the body of federal admiralty law in this country. Therefore, the scope and validity of the policy provisions here involved and the consequences of

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[11]**Aetna Ins. Co. v. Houston Oil & Transport Co.**, 49 F. 2d 121 (1931); **Home Ins. Co. v. Ciconett**, 179 F. 2d 892 (1950).

[12]**Gleb v. Automobile Ins. Co.**, 168 F. 2d 771; **Levine v. Aetna Ins. Co.**, 139 F. 2d 217; **Shamrock Towing Co. v. American Ins. Co.**, 9 F. 2d 57. See also **United States Gypsum Co. v. Insurance Co. of North America**, 19 F. Supp. 767. See Goulder, Evolution of the Admiralty Law in America, 5 Am. Lawyer 311.

[13]E. g., **Canton Ins. Office, Ltd. v. Independent Transp. Co.**, 217 F. 213; **Wheaton Pkg. Co. v. Aetna Ins. Co.**, 185 F. 108; **Robinson v. Home Ins. Co.**, 73 F. 2d 3; **Fidelity-Phenix Ins. Co. v. Chicago Title & Trust Co.**, 12 F. 2d 573.

[14]See Vance, The History of the Development of the Warranty in Insurance Law, 20 Yale L. J. 523; Patterson, Warranties in Insurance Law, 34 Col. L. Rev. 595.

breaching them can only be determined by state law[15] unless we are now prepared to fashion controlling federal rules.

The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties. The control of all types of insurance companies and contracts has been primarily a state function since the States came into being. In 1868, this Court held in *Paul v. Virginia*, 8 Wall. 168, that States possessed regulatory power over the insurance business and strongly indicated that the National Government did not have that power. Three years later, it was first authoritatively decided in *Insurance Co. v. Dunham, supra*, that federal courts could exercise "jurisdiction" over marine insurance contracts. In 1894, years after the *Dunham* holding, this Court applied the doctrine of *Paul v. Virginia* and held that States could regulate marine insurance the same as any other insurance. *Hooper v. California*, 155 U. S. 648. Later, the power of States to regulate marine insurance was reaffirmed in *Nutting v. Massachusetts*, 183 U.S. 552. This constitutional doctrine carrying implications of exclusive state power to regulate all types of insurance contracts remained until 1944 when this Court decided *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533. Thus it is clear that at least until 1944 this Court has always treated marine insurance contracts, like all others, as subject to state control.[16] The vast amount of insurance

[15] **The Hamilton**, 207 U. S. 398, and cases there cited.

[16] For cases subsequent to 1944 holding that States could regulate insurance, see **Robertson v. California**, 328 U. S. 440; **Prudential Ins. Co. v. Benjamin**, 328 U. S. 408.

litigation in state courts throughout our history also bears witness that until recently state legislatures and state courts have treated marine insurance as controlled by state law to the same extent as all other insurance.[17] This is aptly illustrated by a Massachusetts case decided in 1893 which expressly held a generally worded statute of that State relating to warranties to be applicable to marine insurance companies equally with other insurance companies. *Durkee v. India Mutual Ins. Co.*, 159 Mass. 514.

Not only courts, but Congress, insurance companies, and those insured have all acted on the assumption that States can regulate marine insurance. In the Merchant Marine Act of 1920, Congress recognized that marine insurance companies were operating under state laws.[18] Then, following a three-year study of marine insurance, Congress in 1922 passed a law regulating *all* types of insurance in the District of Columbia.[19] This enactment generally referred to as the District of Columbia Model Marine Insurance Act, had the backing of insurance companies generally and was hailed as a model which it was hoped States would copy. Because of a provision in the bill as offered relating to "policy forms and conditions," the bill was first criticized by the national association of shipowners but was later

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[17]See cases collected in 9 L. Ed. 1123; 22 L. Ed. 216; 42 L. Ed. 113; 9 A. L. R. 1314; 13 A. L. R. 893; 43 A. L. R. 222; L. R. A. 1917C 730; L. R.A.1916F 1171; 10 L. R. A. (n. s.) 742; 36 Am. St. Rep. 854; 29 Am. Jur., Insurance, §§227-237, 758-785, 1032-1051, 1198-1224; note 10, **supra.**

[18]41 Stat. 1000, 46 U.S.C. §883(a)(2).

[19]42 Stat. 408, D. C. Code, 1951, §1101, **et. seq.**

approved after the criticized provision was removed.[20] Hearings on the bill make it plain that shipowners and marine insurance companies recognized that marine insurance was then, and would continue to be, regulated by the States. This model bill which it was hoped would serve as a pattern for States to follow was prompted in part by widespread doubt created by *Paul v. Virginia* and *Hooper v. California* that the Federal Government could enter the field at all.[21] Again in 1935 marine insurance was discussed in congressional hearings in connection with the Limitation of Liability Act, 49 Stat. 1479, 46 U.S.C. §§ 181-196. There representatives of shipowners strongly opposed regulation of marine insurance by federal authority, arguing that it was better for the States to retain their regulatory function.[22] Finally, in 1944 and 1945, Congress had before it for consideration bills specifically designed to authorize States to continue to regulate the business of insurance. At the very beginning of extensive hearings on these bills the Committee's attention was directed to that part of this Court's opinion in *Hooper v. California* deciding that States could regulate the marine insurance business the same as they could regulate other kinds of insurance businesses.[23] Again and again

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[20]Hearings before Senate Committee on Commerce on S. 210, 67th Cong., 1st Sess. 111, 112, 213.

[21]**Id.**, at 20-30. See also S. Rep. No. 228, 67th Cong., 1st Sess.; H. R. Rep. No. 582, 67th Cong., 2d Sess.

[22]Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4550, 74th Cong., 1st Sess. 121 **et seq.**

[23]Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362, H. R. 3269, H. R. 3270, 78th Cong., 1st Sess. 7. Attention was also called to **New York Life Ins. Co. v. Cravens**, 178 U. S. 389, and other cases which held that States had power to bar policy provisions deemed contrary to the public interest and compel inclusion of provisions deemed to be in the public welfare.

the Committtee was reminded of the *Paul* and *Hooper* cases which together showed that States had previously been regulating marine insurance as well as all other types. Passage of the bill followed *United States v. Southeastern Underwriters Assn.*, *supra*, holding that, despite the constitutional doctrine embodied in the *Paul v. Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the *Southeastern* case, however, all the opinions had emphasized the historical fact that States had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue. Accordingly, the Act contains a broad declaration of congressional policy that the continued regulation of insurance by the States is in the public interest, and that silence on the part of Congress should not be construed to impose any barrier to continued regulation of insurance by the States.[24]

The hearings on the McCarran Act reveal the complexities and difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress. Courts would find such a task far more difficult. Congress in passing laws is not limited to the narrow factual situation of a particular controversy as courts are in deciding lawsuits. And Congress could replace the presently functioning State regulations of marine insurance by one comprehensive Act. Courts, however, could only do it piecemeal, on a case-by-case basis. Such a creeping approach would

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[24] 59 Stat. 33, 15 U. S. C. § 1011

result in leaving marine insurance largely unregulated for years to come.[25]

In this very case, should we attempt to fashion an admiralty rule governing policy provisions, we would at once be faced with the difficulty of determining what should be the consequences of breaches. We could adopt the old common-law doctrine of forfeiting all right of recovery in the absence of strict and literal performance of warranties, but that is a harsh rule.[26] Most States, deeming the old rule a breeder of wrong and injustice, have abandoned it in whole or in part. But that has left open the question of what kind of new rule could be substituted that would be fair both to insurance companies and policy holders. Out of their abundant broad experience in regulating the insurance business, some state legislatures have adopted one kind of new rule and some another.[27] Some States for example have denied companies the right to forfeit policies in the absence of an insured's bad faith or fraud. Other States have thought this kind of rule inadequate to stamp out forfeiture practices deemed evil. The result, as this Court has pointed out, has been state statutes like that of Texas which "go to the root of the evil" and forbid forfeiture for an insured's breach of policy terms unless the breach actually contributes to bring about the loss insured

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[25]For the multitudinous insurance regulations States have found necessary after long experience, see, e. g., McKinney's N. Y. Laws, Insurance Law; La. Rev. Stat., 1950, Title 22; Vernon's Rev. Civ. Stat., 1936, Title 78.

[26]For criticisms of the rule see note 14, **supra.**

[27]4 Couch, Cyclopedia of Insurance Law, § 819 **et seq.**; 12 Appleman, Insurance Law and Practice, § 7251 **et seq.** For instances where state courts have relaxed the rule of their own accord see 4 Appleman, Insurance Law and Practice, § 2695; 12 **id.**, § 7354

against. *Northwestern National Life Ins. Co. v. Riggs*, 203 U. S. 243, 253-254. Thus there are a number of other possible rules from which this Court could fashion one for admiralty. But such a choice involves varied policy considerations and is obviously one which Congress is peculiarly suited to make. And we decline to undertake the task. See *Halcyon Lines v. Haenn Ship Corp.*, 342 U. S. 282, 285.

Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted.[28] We, like Congress, leave the regulation of marine insurance where it has been—with the States.[29]

The judgments of the Court of Appeals and the District Court are reversed and the cause is remanded to the District Court for a trial under appropriate state law.

It is so ordered.

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[28]Congress has made certain provisions in connection with war risk insurance. 64 Stat. 773, 46 U. S. C. §§ 1281-1294. And to a very limited extent it has authorized governmental agencies to regulate policies and insurance companies which are insuring vessels in which the Government has some interest. 41 Stat. 992, 46 U. S. C. § 868; 52 Stat. 969, 46 U. S. C. §§ 1271-1279; 55 Stat. 243, 50 U. S. C. App. § 1273.

[29]It is faintly contended that the Federal Constitution forbids States to regulate marine insurance, even where Congress acquiesces or expressly consents. This contention is so lacking in merit that it need not be discussed.

(The concurring opinion of Justice Frankfurter and dissenting opinion of Justice Reed and Burton are omitted.)

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18722

FIREMAN'S FUND INSURANCE COMPANY,
Appellant,

versus

WILBURN BOAT COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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(March 23, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and JONES, Circuit Judges.

TUTTLE, Chief Judge: This is the third appearance of this case in this Court. It has been tried three times in the trial court and has been once to the Supreme Court of the United States. On the first trial it appeared that the plaintiffs, Wilburn Boat Company, conceded that specific warranties contained in the policy of marine insurance sued on against use for other than private pleasure, against pledge

and against sale, had been violated. The trial judge thereupon held that the contract should be interpreted under general maritime law, requiring literal performance of warranties and that this rule could not be affected by state law. This Court affirmed in 201 F. 2d 833.

The Supreme Court, 348 U. S. 310, reversed the decision of this Court and of the trial court and held that state laws should be applied in the field of marine insurance, at least "where entrenched federal precedent is lacking," with respect to a specific issue. The Court determined that there was no such entrenched federal precedent as to the effect to be accorded the warranties.

The second trial and appeal are without significance in light of the fact that the case was finally heard and decided on the merits by the district court without the intervention of a jury and a new record completely made as the basis of the appeal that is now before us. The district court concluded that the insurance policy was a Texas contract and that under the Texas law the defenses relied on by the insurance company were not available to it. The court entered a judgment in favor of the plaintiffs.

The defenses asserted by the insurance company were many. They are all urged here on the assumption that the basic findings of evidentiary facts by the trial court can be accepted as true, although the insurer does attack some of the inferences drawn by the trial court from the admitted facts. To place the issues in focus, it is necessary to set out the facts as found by the district court. Before doing so, however, a short explanatory statement will help in understanding the court's findings.

It is not questioned that there were at least three plain breaches of warranty and some eight or nine untrue or

false (these terms are used without implying whether they were or were not fraudulent) statements made or facts concealed. These misstatements are of several kinds:

(1) Actual misrepresentations made to the company when the policy was obtained or when the coverage was increased, and which were thus susceptible of being acted on by the company; (2) Statements made on a form submitted to the Wilburn brothers after the coverage had been increased, in order to justify the increase, but which statements may not actually have been acted upon before the loss of the boat. These statements were on a form called an "application" form in the court's findings of fact. This form was not submitted to the insurance company as a part of an application for the policy or for increase in coverage, but as a source of information sought by the company.

The court's findings of fact are:

> "At all times pertinent hereto Glenn, Frank and Henry Wilburn, and each of them, were residents and citizens of Denison, Grayson County, Texas, and the H. H. Cleaveland Agency of Rock Island, Illinois, hereinafter referred to as Cleaveland Agency, was a duly authorized agent of the Defendant and was engaged in the writing of insurance, including marine insurance, for the Defendant. On May 22, 1947, the Defendant issued through the Cleaveland Agency its marine hull policy No. YA-28579, the policy in question herein, to Robert D. Marshall, a resident of Rock Island, Illinois, and John Shuler, a resident of Des Moines, Iowa, the then owners of the Wanderer, the yacht or vessel here in question, under the terms of which the Wanderer was insured in the amount of $10,000.00 from loss by fire. At the time such policy of insurance was issued the Wan-

derer was located in waters at or near Greenville, Mississippi. The policy contained a provision to the effect that it was warranted by the Assured, or the owners of the vessel, that the vessel would be used for private pleasure purposes during the term of the policy and would not be hired or chartered unless permission to do so was granted by indorsement to the policy. Among the conditions of the policy was a provision to the effect that the insurance extended by the policy shall be void in case the policy or the interest insured thereby should be sold, assigned, transferred or pledged without the previous consent of the Defendant. Another pertinent provision of the policy was:

> " 'This Entire Policy Shall Be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject matter thereof, or, in case of any fraud or false swearing by the Assured touching any matter relating to this insurance or the subject matter thereof; whether before or after loss.'

"In June 1948 and for sometime prior thereto and at all other times pertinent hereto the Defendant had a permit to do and was doing business in the State of Texas.

"On or about June 4, 1948, and at a time when the coverage of the insurance policy in question had been extended to May 22, 1949, Glenn, Frank and Henry Wilburn purchased the Wanderer from Robert D. Marshall and John Shuler for a consideration of $9,000.00. As a result of this purchase each of said Wilburns owned an undivided one-third interest in the boat. At that time the Wanderer was still located on waters at or near Green-

ville, Mississippi. It was the intention of the Wilburns to move said boat from its mooring in Greenville, Mississippi, to Lake Texoma, a large inland lake located near Denison, Texas, with part of said lake being located in Texas and the remainder thereof located in the State of Oklahoma. The Wilburns moved the boat by water from Greenville, Mississippi, up the Mississippi River to the Red River and then up the Red River to the Lake Texoma Dam near Denison, Texas. The boat was then moved overland around the dam and launched on Lake Texoma in July or August 1948 after certain changes and repairs were made to the boat. After the boat was launched on Lake Texoma it was taken to the Texoma Boat and Dock Company, a boat repair business located in Texas on Lake Texoma, where additional extensive repairs and remodeling were performed on the boat. *At the time the Wilburns purchased the boat they intended to use it for the carrying of passengers for hire on Lake Texoma.* [Emphasis added.]

"For sometime prior to June 4, 1948, and at all pertinent times subsequent thereto R. L. McKinney of Denison, Texas, owned and operated an insurance agency in Denison, Texas, under the name of R. L. McKinney Agency, writing insurance of various types for various insurance companies he represented. McKinney prior to June 4, 1948, had written various types of insurance for the Wilburns. The Defendant never at any time prior to June 4, 1948, authorized McKinney to solicit or write insurance of any kind for it. At or about the time the Wilburns purchased the Wanderer Frank Wilburn contacted R. L. McKinney in Denison, Texas, and requested McKinney to obtain for himself and his brothers insurance coverage on the Wanderer. McKinney, who was

not authorized to write on behalf of any of the companies he represented the marine insurance the Wilburns desired on the Wanderer, made a telephone call to a representative of the Cleaveland Agency in Rock Island, Illinois. In this telephone conversation McKinney advised the Cleaveland Agency representative, namely, one J. B. White, that he, McKinney, was an insurance agent in Denison, Texas, and was acting as agent for Frank and Henry Wilburn who had purchased the Wanderer; that he, McKinney, had no facilities for writing the hull coverage desired and requested White to arrange with the Defendant to continue its coverage of the Wanderer while the boat was being moved from Greenville, Mississippi, to Lake Texoma. Representative of the Cleaveland Agency then contacted the Chicago office of the Defendant and made known to the Defendant the request made by McKinney for the transfer of the coverage of the Wanderer to the Wilburns. The Defendant, through its Chicago office, agreed to transfer the coverage of the policy in question to the Wilburns, and on June 8, 1948, the Cleaveland Agency wired McKinney at Denison, Texas, to the effect that the Defendant was binding the Wanderer with full marine perils coverage and that indorsements would follow. Thereafter, the Defendant issued an indorsement to the policy in question showing that the name of the assured, effective June 8, 1948, was changed from Robert D. Marshall and John Shuler to Frank and Henry Wilburn. This indorsement was transmitted by the Defendant to the Cleaveland Agency who, in turn, forwarded same by mail to McKinney in Denison, Texas.

"The premium for the coverage extended the Wilburns on the Wanderer, as aforesaid, was the sum of $419.56. The Wilburns paid this premium

by issuing their check drawn on a Denison, Texas, bank payable to the Cleaveland Agency, which check they, in turn, delivered to McKinney who, in turn, transmitted it to the Cleaveland Agency. The Cleaveland Agency then caused the check to be presented for payment, and same was paid by the Denison, Texas, bank upon which it was drawn. By letter dated August 6, 1948, McKinney requested the Cleaveland Agency to indorse the policy of insurance in question so as to show Glenn, Frank and Henry Wilburn, d/b/a Wilburn's Boat Company as the assured. By indorsement dated August 6, 1948, the Defendant so indorsed the policy and such indorsement was forwarded to McKinney at Denison, Texas. On October 4, 1948, Defendant again indorsed the policy because of the fact that the Wilburns had installed a diesel marine engine in the Wanderer and as a result of that were entitled to a return of a portion of the premium previously charged by the Defendant. On December 14, 1948, McKinney addressed a letter to the Cleaveland Agency in which he advised, in effect, that the Wilburn Brothers then had an investment of $40,000.00 in the Wanderer, and that they would like to know what rate would be charged to increase the insurance in question to $40,000.00. On December 20, 1948, the Cleaveland Agency wired McKinney the amount the $30,000.00 additional insurance would cost. By letter dated December 21, 1948, McKinney requested the Cleaveland Agency to increase the coverage of the policy in question by $30,000.00. The Defendant, upon being advised by the Cleaveland Agency of such request for additional insurance, caused such additional insurance, to be issued by indorsement to the policy in question effective December 30, [sic] 1948, as a result of which the coverage of the policy in question was increased to $40,000.00.

This indorsement was forwared by the Cleaveland Agency to McKinney at Denison, Texas, by letter dated December 20, 1949. The policy of insurance in question and each and every indorsement thereto, and above mentioned, was delivered by the Cleaveland Agency through the United States mails to McKinney at Denison, Texas, and, in turn, delivered by McKinney to the Wilburns in Denison, Texas, prior to February 25, 1949. At the time the Defendant agreed to transfer the policy of insurance in question to the Wilburns and at all times subsequent thereto it knew that Glenn, Frank and Henry Wilburn, and each of them, resided in Denison, Texas:

"On December 28, 1948, the Defendant's Chicago office wrote the Cleaveland Agency and stated, in effect, that in view of the substantial increase in the coverage they had extended the Wanderer, the Wilburns should have a competent marine surveyor inspect the Wanderer and furnish the Defendant with the surveyor's estimate of its present day value or, in the event a surveyor was not available, a new completed yacht application, together with bills and invoices for the work and for the new installations completed, should be furnished. By letter dated January 25, 1949, addressed to McKinney, the Cleaveland Agency advised McKinney of the Defendant's request that the Wilburn's have a competent marine surveyor inspect the vessel and forward to McKinney an application form or blank to be used in making the report of the surveyor's inspection. McKinney made the survey of the Wanderer and the application and survey form furnished McKinney by the Cleaveland Agency, as aforesaid, was completed by McKinney, signed by J. F. (Frank) Wilburn, and transmitted by McKinney to the Cleaveland Agency. The Cleaveland Agency

on February 9, 1949, forwarded said completed application and survey report to the Defendant's Chicago office. The application and survey report showed the owners of the Wanderer to be the Wilburn brothers of Denison, Texas; that the cost of the vessel to the Wilburn brothers was $30,000.00 plus $10,000.00 for engine, lighting and fire fighting equipment; that the estimated market value of the vessel was $40,000.00; that the vessel was not subject to any mortgage or other encumbrance; that the water to be navigated by the vessel was Lake Texoma, north of Denison, Texas; that the vessel is used for commercial purposes; that the vessel is chartered; that the summer location of the vessel is Burns Run Resort, Lake Texoma; and that the winter location of the vessel is Lake Texoma Boat & Dock Company. The application and survey report contained additional information descriptive of the vessel, its engines and rigging. Neither this application and survey report nor a copy thereof nor any other statement nor copy thereof made by the Wilburns in connection with the obtaining of the insurance coverage in question was ever attached to the policy in question. The Defendant, after receiving the application and survey report on or about February 9, 1949, took no further action with reference to the policy prior to the destruction of the Wanderer by fire with the exception of receiving from the Cleaveland Agency a copy of an indorsement to the policy dated October 4, 1948, signed by the Wilburns and showing the replacement of the gasoline engine of the Wanderer with a diesel engine, which indorsement was forwarded to Defendant's Chicago office by letter of the Cleaveland Agency dated February 11, 1949.

"On February 25, 1949, the Wanderer was completely destroyed by fire while it was moored

to a buoy in Lake Texoma approximately 300 feet from the shore and in the vicinity of Burns Run Resort, which resort is located on the Oklahoma shore line of Lake Texoma. The place where the Wanderer was moored at the time of its destruction by fire is located in the State of Oklahoma.

"The Wanderer was not used solely for private pleasure purposes during its ownership by the Plaintiffs, but on the contrary said boat was purchased by the Wilburns with the intention of being chartered and used for hire, was remodeled and re-equipped for such purposes, and to the extent that patronage was available, was chartered and used for hire from the time of its acquisition by the Wilburns until its destruction by fire. However, during that time the boat was only used for hire three or four times. During January 1949 the boat was damaged as the result of a storm. It was then taken from its regular mooring at Burns Run Resort to Lake Texoma Boat and Dock Company for repairs and remained at Lake Texoma Boat and Dock Company undergoing repairs until three or four days before February 25, 1949, at which time it was returned to its regular mooring at Burns Run Resort. Lake Texoma Boat and Dock Company is located in Texas on the Texas shore of Lake Texoma. From the time the boat was damaged by storm in January 1949 up to its destruction by fire on February 25, 1949, it was not used for commercial purposes of any nature and was not used for any purpose except being returned to Burns Run Resort a few days before February 25, 1949, as aforesaid.

"In July 1948 Glenn, Frank and Henry Wilburn caused a corporation, known as the Wilburn Boat Company, to be formed under and by virtue of the laws of the State of Oklahoma. The capital

stock of this corporation was shown to be $40,000.00 and the sole and only asset the corporation ever had was the Wanderer, title to which was transferred to it as hereinafter pointed out. All of the stock of the Wilburn Boat Company was owned at all times by Glenn, Frank and Henry Wilburn. The corporation, Wilburn Boat Company never at any time had a permit to do business in the State of Texas.

"In June 1948 the Plaintiffs, Glenn, Frank and Henry Wilburn, borrowed $10,000.00 from the Citizens National Bank of Denison, Texas, and on August 4, 1948, Wilburn Brothers Boat Company, acting by and through Frank and Henry Wilburn, borrowed an additional $10,000.00 from said bank. On the last mentioned date said Wilburn Brothers Boat Company, acting by and through Frank and Henry Wilburn, executed a chattel mortgage covering the Wanderer in favor of the bank to secure the payment of the $20,000.00 borrowed from the bank. On September 24, 1948, by bill of sale of that date, Glenn, Frank and Henry Wilburn trnasferred the Wanderer to the Plaintiff, Wilburn Boat Company, a corporation, reciting a consideration of $9,000.00. On October 25, 1948, Wilburn Boat Company, a corporation, executed a promissory note in favor of Frank and Henry Wilburn in the amount of $8,000.00, and on the same date said corporation executed a chattel mortgage covering the Wanderer to secure the payment of said $8,000.00. The sale of the boat to the Wilburn Boat Company, a corporation, and the mortgaging of said boat to the Citizens National Bank of Denison and to Frank and Henry Wilburn, as aforesaid, were done without the consent of the Defendant. At the time the Wanderer was destroyed by fire the indebtedness of $20,000.00 to the Citizens National Bank of Denison

and the indebtedness of the Wilburn Boat Company, a corporation, to Frank and Henry Wilburn in the amount of $8,000.00, above mentioned, were unpaid and the chattel mortgages, above mentioned, had not been released.

"Immediately upon the Wanderer being destroyed by fire the Plaintiffs notified McKinney and McKinney, in turn, advised the Cleaveland Agency by telegram on February 25, 1949, of the destruction of said boat by fire. The Cleaveland Agency promptly advised the Defendant's Chicago office of the destruction of the boat. The plaintiffs, by letter dated March 3, 1949, addressed to the Defendant and to the Cleaveland Agency, forwarded the Defendant a sworn statement of proof of loss covering the loss of the Wanderer. On May 12, 1949, the Defendant, by letter to the Plaintiffs, returned to Plaintiffs the sworn statement of the proof of loss previously submitted by the Plaintiffs and denied liability to the Plaintiffs for the loss and returned to Plaintiffs the premiums Plaintiffs had previously paid the Defendant on the policy in question. The Plaintiffs refused to accept the premium so returned. In said letter of May 12 it was stated, in effect, that the Defendant was denying liability because: (a) of the sale of the Wanderer by Glenn, Frank and Henry Wilburn to Wilburn Boat Company; (b) of the mortgaging or pledging of said boat by the Plaintiffs; (c) the Plaintiffs did not have an investment of $40,000.00 in the boat; and (d) the boat had been used for commercial purposes and had not been used for pleasure purposes.

"It is as difficult to determine with any degree of accuracy the amount of money the Wilburns had invested in the Wanderer at the time of its destruction from the record made at the last trial as it was to determine such from the record made

at the first trial. However, the record establishes, and I so find, that without placing a value on the time and effort spent by the three Wilburn brothers in connection with the remodeling or rebuilding of the Wanderer the Wilburns had substantially less than $40,000.00 invested in the boat. Notwithstanding the fact that the Wilburns had invested in the Wanderer a sum less than $40,000.00, I find from the evidence that the fair cash market value of the Wanderer immediately prior to its destruction was $40,000.00.

* * * * *

". . . I find and conclude that McKinney was not the agent or representative of the Defendant but as to his dealings with reference to the insurance policy in question was the agent or representative of the Plaintiffs. Under the facts in this case McKinney would be the agent of the Defendant only if the provisions of Art. 5056, Revised Civil Statutes of Texas, 1925 (now Sec. 21.02 of the Texas Insurance Code) made him such. Said statute as construed by the Courts did not make McKinney the agent or representative of the Defendant."

It must be borne in mind during the following discussion that the appellant's defenses fall into two categories. The first of these consists of *three breaches of warranty*. The second is based upon eight concealments and/or misrepresentations of fact. Three of the eight are the facts that also constituted the breach of the express warranties. The remaining concealments and misrepresentations, if material, also violated an express provision of the contract against concealment or misrepresentation of any material fact or circumstance.

As to the breach of warranties part of its defense appellant contends that the policy was avoided because the Wilburns (1) used the Wanderer to carry passengers for hire in violation of the warranty that the vessel would not be so used without the previous consent of the appellant; (2) mortgaged the Wanderer in violation of the warranty that the vessel would not be mortgaged without the previous consent of appellant; and (3) sold the Wanderer to the Wilburn Boat Company, a corporation, in violation of the warranty that the vessel would not be sold without the previous consent of appellant.

In the misrepresentation and concealment part of its defense, appellant claims that the policy's *express provision* against misrepresentation and concealment was violated by the appellees' concealment and misrepresentation of the *above facts* (numbered 1, 2 and 3) and by their concealment and misrepresentation of the *following facts:* (4) that the Wanderer was purchased with the *intention* of using it to carry passengers for hire contrary to the warranty that it would not be so used; (5) that the appellees had considerably less than $40,000.00 *invested* in the Wanderer, contrary to their statement that they had $40,000.00 *invested* in the Wanderer; (6) that the engine of the Wanderer was a rebuilt one and that it cost appellees only $2,700.00, contrary to their statement that the engine was new and cost $5,000.00; (7) that the winter location of the Wanderer was Burns Run Resort, contrary to their statement that the winter location was Lake Texoma Boat and Dock Company; and (8) that the Wanderer was damaged at Burns Run Resort in January, 1949, contrary to their statement that it had not been damaged.

DEFENSES BASED ON BREACH OF WARRANTIES

The District Court, applying Texas law, held (A) that the use of the Wanderer to carry passengers for hire was no defense *based on breach of the warranty* against such use because the breach warranted against did not contribute to bring about the destruction of the vessel within the meaning of Article 6:14 of the Texas Insurance Code; (B) that the mortgaging of the Wanderer was no defense based on breach of the warranty against mortgaging because Article 5:37 of the Texas Insurance Code invalidates anti-encumbrance provisions in an insurance policy; (C) that the sale to the corporation was no defense based on breach of the warranty against sale because the sale did not increase the motive of appellees to destroy the boat nor decrease their motive to preserve it.

In view of the clear language of the statutes, and recognizing the undoubted uniform application of the law by the Texas courts to the effect to be given to warranties, we find that neither of the first two breaches of warranty can be urged as a defense. We find, therefore, that in finding

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[1] Art. 6:14 Breach by Insured

No breach or violation by the insured of any warranty condition or provision of any fire insurance policy contract of insurance or application therefor, upon personal property, shall render void the policy or contract or constitute a defense to a suit for loss thereon unless such breach or violation contributed to bring about the destruction of the property.

[2] Art. 5:37 Liens on Insured Property

Any provision of any policy of insurance issued by any company subject to the provisions of this subtitle, or the effect of said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character, such policy shall be void, and such provision within or placed upon such policy shall be null and void.

against the defenses of breach of warranty arising from parts numbered 1 and 2 above, the trial court followed the Texas law.

As regards the conclusion of the trial court as to the third breach of warranty—the agreement not to sell the boat without express permission of the insuror—the law is not so clear. Since, in view of the basis of our disposition of the case we do not have to resolve that issue we merely state appellant's contention that a breach of a warranty contained in a fire insurance policy on personal property is a good defense if the breach, by its very nature, could not contribute to bring about the destruction of the insured property. See e.g., *McPherson v. Camden Fire Insurance Co.*, 222 S.W. 211 (Tex. Comm. App.). Since it is apparent that the sale of the vessel to the corporation could not of itself have contributed to bring about the vessel's destruction by fire, the appellant contends that Article 6:14 does not bar the appellant from relying on the breach of the warranty against sale as a defense.

DEFENSES BASED ON MISREPRESENTATIONS AND CONCEALMENT

The trial court further held that the concealment and misrepresentation of all of the eight numbered facts above did not violate the provision of the policy relating to concealment and misrepresentation because these facts did not contribute to bring about the destruction of the Wanderer within the meaning of Article 6:14, and, further, because these facts were immaterial to the risk and they were not *intentionally* concealed or misrepresented with the *intent to deceive* the appellant.

In analyzing appellant's contentions in this part of its defense it is vital to remember that they are based on a

contractual provision, not on the common law of concealment and misrepresentation. Because of its significance, we quote that provision again:

> "This Entire Policy Shall Be Void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject matter thereof, or, in case of any fraud or false swearing by the Assured touching on matter relating to this insurance or the subject matter thereof; whether before or after loss."

As we see it, then, appellant's defense here raises only two issues for decision. They are: (1) whether the facts concealed and misrepresented were material to the risk, and (2) whether there is anything in the Texas statutes which would prevent appellant from relying on the concealment and misrepresentation of material facts as a defense.

It is clear that the appellees concealed and/or misrepresented the facts set out above.[3] The initial question, there-

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[3] Appellees concealed and affirmatively misrepresented the intended and actual use of the vessel to carry passengers for hire, and the sale and mortgaging of the vessel. These facts were not disclosed to the appellant when the appellees requested the $30,000.00 increase in coverage in December, 1948. The appellees affirmatively misrepresented the true amount they had invested in the Wanderer when they applied for the increased coverage. This fact, along with the facts relating to the use, sale and mortgaging and the other facts set out above, were affirmatively misrepresented in the "application" form completed by the appellees. This "application" form contained the following questions and answers:

"(a) Owner of vessel? A. Wilburn brothers.
(b) Occupation of owner? A. Meat Packers.
(c) Cost of vessel to present owner? A. $30,000.00.
(d) Any mortgages or encumbrances on vessel? A. None.
(e) Is vessel ever let, chartered or used for carrying passengers for hire? A. Chartered.

fore, is whether these facts were material to the risk. In this connection, the authorities are virtually unanimous in holding that "a material fact is any fact, 'the knowledge or ignorance of which would naturally influence an insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance.'" *Indiana and Ohio Livestock Ins. Co. v. Smith*, 157 S.W. 755, 756 (Tex. Civ. App. 1913). See 24B Tex. Jur., Insurance, Section 187 (1956) and 29 A. Jur., Insurance, Section 701. If this is the test of materiality, it is impossible to see how the District Court could conclude otherwise than that some of the facts concealed and misrepresented were material to the risk.

We now deal with each of them separately.

As to the contemplated and actual use of the Wanderer *as an excursion boat*, the simple fact is that McKinney, the agent of the appellees to procure insurance,[4] attempted to

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(f) Winter location of vessel? A. Lake Texoma Boat & Dock Company.
(g) Any prior damage to vessel? A. None.
(h) Engine new or used? A. New.
(i) Cost of engine if purchased separately? A. $5,000."

If appellees had been telling the truth, the answers would have been as follows:

(a) A. Wilburn Boat Company, Inc.
(b) A. Excursion and chartering business.
(c) A. About $25,000.
(d) A. Yes.
(e) A. Chartered and used for carrying passengers for hire.
(f) A. Moored off Burns Run Resort.
(g) A. Yes.
(h) A. Used.
(i) A. $2700.

[4]Of course, there can be no doubt that the appellees are bound by the conduct of their agent, McKinney. Interstate Fire Ins. Co.

place the risk with numerous marine underwriters in Texas but was turned down without exception *because these underwriters considered the risk to be too hazardous.* To preclude another rejection, McKinney did not disclose to the appellant that the Wanderer would be used to carry passengers for hire. Moreover, he accepted for the appellees a policy which contained a warranty that it would not be so used, at a time when it was their intention to breach the warranty. Further, he deliberately falsified his reason for seeking insurance from the appellant by stating that "he had no facilities for writing hull coverage, *being located where he was.*" The undisputed evidence in the record shows that insurance policies on excursion boats command a much higher premium than policies on private pleasure craft and that the former policies customarily contain a provision requiring the attendance of a watchman when the vessel is not in operation. In our view, the fact that the appellees intended to and did actually use the Wanderer to carry passengers for hire, was as "material" to the risk as any other fact that could be imagined. Any finding by the trial court to the contrary was clearly erroneous.

In view of this determination that there was a false representation as to the intent of the owners of the prospective use of the boat which was material to the risk, we do not undertake to decide whether the trial court's decision as to the materiality of the other concealments or other misrepresentations would support a reversal of its judgment. We nevertheless consider that it is appropriate to comment briefly on each of these other admitted misrepresentations or concealments

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v. Sorrells, 205 S.W. 212 (Tex. Civ. App. 1927); St. Paul Fire & Marine Ins. Co. v. Garnier, 196 S.W. 980, 985 (Tex. Civ. App. 1917).

As to the mortgaging of the Wanderer, appellant contends that the law is clear that the existence of a chattel mortgage, whether filed or unfiled, is material to the taking of a risk on personal property. See *Franklin Fire Ins. Co. v. Fullen*, 139 S.W. 2d 370 (Tex. Civ. App. 1940). 3 Couch, Insurance, Sec. 784.

Likewise, as to the sale of the boat to the corporation wholly owned by the Wilburn brothers, appellant points to the most significant fact that one of the owners testified that the sale to the corporation had as its primary purpose the safeguarding of the Wilburns as individuals from any personal liability claims which might arise if a passenger was to be injured aboard the Wanderer. This, says the appellant, would diminish the motive of the Wilburns to keep the boat in safe condition. Appellant contends that this factor "would naturally influence an insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance." *Indiana and Ohio Livestock Ins. Co. v. Smith*, supra.

In urging that the amount of appellees' actual investment in the Wanderer ("cost of present owner") was material, the insurance company points to the fact that the question in the "application" form asked the appellees both for the "estimated market value" of the vessel *and* the "cost of vessel to present owner." It is argued that since "the extent of the interest of the assured in the property insured measures the moral hazard, and hence is always material to the risk of the insurance," *Conn. Fire Ins. Co. v. Manning*, supra, the fact that the vessel may have had a market value of $40,000 at the time of the

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[6]The Texas courts so hold despite the fact that anti-encumbrance provisions are invalid under Article 5537 of the Texas Insurance Code, quoted in note 2, supra.

loss does not affect the materiality of the appellees' actual investment in the vessel.

Touching on the response to the question in the application form as to the winter location of the vessel, appellant points to the fact that the Lake Texoma Boat & Dock Co., where the owners *said* the vessel was located in the winter, is a large concern where a great many boats are stored and which maintains a watchman service at all times; whereas Burns Run Resort, where the vessel *was actually moored* in the winter and where it was destroyed by fire, is a relatively secluded section of beach. Appellant says that this answer was patently material to influencing the insuror's judgment as to whether to take or increase the risk.

Although the true nature and cost of the engine, as compared to the facts stated by the insured, represent a relatively small amount of money, appellant insists that the bald statement by the insured that the engine was *new* and *cost $5,000*, whereas it was a *reconditioned engine* and *cost $2,700*, is a sufficiently material false representation to avoid the policy under the warranty against false representations.

Finally, the appellant insists that the false answer by the Wilburns stating that there had been no previous damage to the boat, whereas it had been damaged in a storm and had been repaired at some considerable cost, was likewise a breach of the warranty against false representation constituting a good defense against recovery on the policy.

Because of the fact that we have found that there was a false material representation at the time the policy was obtained by the insured, we do not consider it necessary to pass upon these several contentions based on the other misrepresentations. This also makes it unnecessary for us

to decide whether the fact that some of these false representations were contained in the form submitted by the insurance company after the increase of the coverage would destroy their availability as defenses on the ground that the form on which they were written is what is normally called an "application" form.[6]

We next come to appellees' contention that a fact cannot be material if it relates to a risk which is expressly covered by a contractual warranty. In other words, they claim that the false representation touching on the use of the Wanderer for the carrying of passengers instead of for pleasure purposes was immaterial simply because there was a specific warranty relating to this use. Whatever may be the law elsewhere, however, it seems clear that this is not the law in Texas. In *Franklin Fire Ins. Co. v. Fullen*, supra, the insuror defended a suit on the policy by claiming that the insured had falsely represented that the insured property was unencumbered. Although the policy contained an anti-encumbrance clause which, of course, was invalid under Article 5:37 of the Texas Insurance Code, the Court held that the encumbrance was a material fact and allowed the insuror to raise the defense of misrepresentation of this fact.

The District Court further erred in assuming that Article 6:14 of the Texas Insurance Code applies to a policy provision against concealment and misrepresentation. Article 6:14, as noted above, provides, in effect, that no breach of any provision of an insurance policy shall constitute a defense to a suit on the policy unless the breach contributed

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[6]The point that is here made is that no statements contained on this form can be considered as a defense to a suit on the policy because under Article 21:35 of the Texas Insurance Code such misrepresentation cannot be raised if contained in an "application" unless the application is actually attached to the policy.

to bring about the destruction of the property. But, as we have already noted above, the Texas courts have long held that Article 6:14 does not apply to a breach which, by its very nature, could not contribute to bring about the destruction of the property. See e.g., *McPherson v. Camden Fire Ins. Co.*, 222 S.W. 211 (Tex. Comm. App. 1920). It is obvious that a concealment or misrepresentation by the assured could never contribute to the destruction of the insured property. The *facts* concealed might, in some cases, bring about the destruction but not the *misrepresentation or concealment* of them. The policy provision against concealment or misrepresentation was not designed to prevent fires; it was meant to assure the appellant insurance company that it would have all the information necessary to the handling of the insurance.

That Article 6:14 is not applicable to the clause under consideration is, we think, conclusively demonstrated by the fact that Article 21:16 of the Texas Insurance Code expressly provides that:

> "Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case."

If this clause of the insurance contract were within the purview of Article 6:14, then Article 21:16 would be virtually meaningless, and the enactment of the latter article would be "a work of supererogation not to be attributed to the legislature." *McPherson v. Camden Fire Ins. Co.*, supra, at 215.

The reference to Article 21:16 poses the next question, and that is, what effect, if any, does that article have with respect to appellant's defense of concealment and misrepresentation? Appellees contend that, under Article 21:16, concealment and misrepresentation is no defense unless the matter concealed or misrepresented was material to the risk *and* contributed to the loss. This contention is based on the last sentence of the statute, which provides that the *question* (not questions) of materiality *and* contribution should be left for the jury, and it is supported by a dictum in one Texas case. See *Trinity Reserve Life Ins. Co. v. Hicks*, 297 S.W. 2d 345, 349. There are numerous cases to the contrary,[7] however, and, in our judgment, these latter cases adopt much the sounder view.

It is obvious that a fact can be material to the risk without its contributing to bring about the destruction of the insured property. As the Court stated in *Inter-Ocean Ins. Co. v. Ross*, 315 S.W. 2d 71, 73-74 (Tex.Civ.App. 1958),

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[7]See e.g., Fidelity Union Fire Ins. Co. v. Pruitt, 23 S.W. 681, 684 (Tex. Comm. App. 1930); Aetna Accident & Liability Co. v. White, 177 S.W. 162, 165 (Tex. Civ. App. 1915); Indiana & Ohio Live Stock Ins. Co. v. Smith, 157 S.W. 755, 766 (Tex. Civ. App. 1913). In 24B Texas Jurisprudence, Insurance, at page 417, it is said:

> "Under the statute [Article 21:16], a representation or warranty, even though false, does not avoid a policy or afford a defense unless the matter misrepresented was material to the risk or actually contributed to the loss. [Emphasis added].

"it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur." On the other hand, it is virtually impossible to conceive of an *immaterial* fact contributing to bring about the destruction of the insured property. This being so, it becomes apparent that appellees' construction of the statute would render the materiality requirement in the statute absolutely useless. Assuming, as we must, that the reference to materiality in the statute was intended to have some meaning, it is impossible to justify an interpretation of the statute which would deprive it of all effect. This is precisely what the appellees urge us to do.

Moreover, Article 21:16, by its terms, does not even apply (a) to *concealments* or (b) to misrepresentations not contained in the application for insurance or the policy itself. Thus, it would not apply, for example, to McKinney's concealment of the intended use of the Wanderer when applying for the insurance or to the oral misrepresentation made by McKinney in December, 1948; when he applied for the increase in coverage, as to the amount the appellees had invested in the Wanderer.

There remains for consideration the District Court's conclusion that the appellant could not succeed in its defense of concealment and misrepresentation unless it proved (a) that the appellees *intentionally* concealed and misrepresented material facts *with the intent to deceive* the appellant by inducing it to issue the policy on the basis of these concealments and misrepresentations. In other words, the District Court assumed that the appellant was required to prove all the elements of a common law action of deceit, factor (a) above being the fraudulent motive, and factor (b) being the element of reliance.

In so holding, the District Court failed to appreciate the fact that appellant's defense was not that it had been deceived by the appellees, but that the appellees had breached a specific provision of the insurance contract. That provision unambiguously states that the policy is to become void if the insured conceals or misrepresents a material fact "whether before or after loss." There is no requirement that the insured have an intent to deceive the appellant, or that the appellant rely on the concealments and misrepresentations in issuing the policy. Indeed, the language of the provision plainly provides that the policy shall be rendered void if the insured conceals or misrepresents a material fact *or* "in case of any *fraud* or false swearing by the Assured." If the concealment and misrepresentation which will void the policy must amount to common law fraud, then the express and separate reference to fraud in the provision is meaningless.

But we need not rely solely on this reasoning to support this view of this case. In *Chaachou v. American Central Ins. Co.*, supra, this Court had before it a policy provision similar to the one under consideration here.* The insured, who had made false statements in his proof of loss, contended that the false statements were no defense to his suit unless the insuror could demonstrate that it had relied on these statements. We rejected this contention, and, in so doing, made the following remarks:

> "We think that, as against this attack, the Court's charge was eminently correct. We start, first, with a contract which, plain in its terms, cannot be ignored by invoking the principle which

*It is interesting to note that the policy provision under consideration in *Chaachou*, unlike the provision here referred to "willful concealment or misrepresentation."

deplores forfeitures, Fidelity-Phenix Fire Insurance Co. of New York v. Benedict Coal Corporation, 4 Cir., 64 F. 2d 347, certiorari denied 289 U.S. 762, 53 S. Ct. 795, 77 L. Ed. 1505, or construes policies most strongly against the insurer and in favor of the assured, Palatine Insurance Co. v. Whitfield, 73 Fla. 716, 74 So. 869. Thus the agreement of the parties called precisely for honesty and fair dealing by the assured and unless there be a public policy against people contracting to be honest and refraining from wilful false swearing and misrepresentation, it is a contract which, as any other, ought to be enforced . . .

"The contract does not spell out that it is only false swearing, misrepresentation, concealment or fraud which is successful that avoids the policy. Nor is there any reason why any such condition should be read into it. Clearly, in the absence of a statute, the law, which is founded on truth and justice, will not regard it as unsound that a person has lost the benefit of the contract by wilful, immoral, dishonest acts which the contract itself condemns.

"Moreover, if the law out of some misgivings about forfeitures, were to require that the insurer demonstrate that it had been misled to its prejudice by the fraud, the policy provision would both be virtually worthless and put a premium on dishonest dealings by the assured. For if, by its own investigation, inspired perhaps by suspicions of the assured's efforts to misrepresent, the insurer satisfied itself that a fraud had been attempted and declined to pay, such a rule would mean that the assured's claim would then stand as though no dishonest acts whatsoever had been practiced. The mendacious assured, surveying the possibilities and contemplating prospective tactics

and strategy in the handling of his claim, would sense immediately that *vis-a-vis* himself and the underwriter, there would be no risk at all in his deceit. If it worked, he would have his money and, at worst, could be compelled to disgorge only by affirmative suit by the insurer if the fraud were discovered in time to be legally or practicably effective. If it didn't work—if, before consummation, fraud was detected—he would suffer no disadvantage whatsoever. It would be an everything-to-win, nothing-to-lose proposition.

"Additionally, such a rule would cast the underwriter in a role for which it is unsuited and in a process which the general good, out of long experience, considers best performed by government machinery. Convinced, as here by its own investigation of the claim, of dishonest acts by the assured, it would then have to undertake the task of segregating truth from untruth, ferreting out the honest from the dishonest, choosing the right from amongst the wrong with all or much of the factual material coming from one now considered to be morally unreliable.

"The public interest is not furthered by these likely consequences of reading into the contractual language this burden nowhere expressed. A judge-made policy which thus gives advantage to dishonesty will retard, not accelerate, the orderly adjustment of insurance losses. If the insurer, from the strong language of the contract interpreted in equally plain terms by the law, is entitled to assume that the assured is dealing honestly and fairly, asserting only that which in good faith is believed to be the substantial truth of the matter, the claim can be handled in a spirit and atmosphere of confidence. If, on the other hand, the insurer must realize that fraud is significant only

> if it is finally successful, that the slate is wiped clean if its own investigation uncovers the assured's cozening, the setting may then become one of hostile antagonism, reluctance and apprehension forcing more, not less, litigation."
>
> 241 F. 2d at 890-891.[9]

There is nothing in the Texas statutes requiring an intent to deceive and reliance if concealments and misrepresentations are to avoid a policy under an express contractual stipulation.[10] Rather, the Texas legislature had affirmatively indicated its position with respect to these contract provisions by providing that they shall not bar a claim unless the concealment or misrepresentation relates to a material fact or a fact which contributes to bring about the loss.[11] The law of deceit applies to insurance

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[9]See also Burritt v. Saratoga County Mut. Fire Ins. Co., (N.Y.) 5 Hill 188, 40 Am. Dec. 345; Dennison v. Thomaston Mut. Ins. Co., Me. 125, 37 Am. Dec. 42; Modern Woodmen of America v. Atcheson, 219 S.W. 537 (Tex. Civ. App. 1920).

[10]It is extremely significant that Article 21:16 has been held to apply only to non-fraudulent misrepresentations. St. Paul Fire & Marine Ins. Co. v. Garnier, 196 S.W. 980, 985 (Tex. Civ. App. 1917). In other words, if a false statement is made with the intent to deceive the insuror, the policy is rendered void by a contractual provision against misrepresentation even if the misrepresentation relates to an immaterial fact which did not contribute to bring about the loss. It is clear, therefore, that under Texas law breach of a contractual provision against misrepresentation should be good defense if (a) the misrepresentation was fraudulently made, **or** (b) the fact misrepresented was material, **or** (c) the fact misrepresented contributed to bring about the loss.

[11]Note that Article 21:19 of the Texas Insurance Code, which applies to false statements in **proofs of loss**, provides that no such misrepresentation shall constitute a defense to a suit on the policy unless it was **fraudulently made**, related to a material fact and **misled the insuror.** See Fireman's Fund Ins. Co. v. Reynolds, 85 S.W. 2d 826, 829 (Tex. Civ. App. 1935).

contracts as it does to all other contracts, but if the contracting parties stipulate that deceit is unnecessary to put the contract at an end, it is not for the courts to question the wisdom of their decision. If such stipulations are regarded as contrary to public policy, the legislature or the courts can say so. Since, however, neither the legislature or courts of Texas have made this decision, we can not see how or why we should make it for them.

But even if we were to formulate such judge-made law in the face of the contractual provision, appellees, in our opinion, would be no better off. Nothing is better established in the law of *marine* insurance than that "a mistake or commission material to a marine risk, whether it be wilful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy. And the same rule obtains, even though the insured did not suppose the fact to be material." 3 Couch Insurance, at page 2568. And it is stated in 29 American Jurisprudence, Insurance, at page 956:

> "§690.—IN CASE OF MARINE INSURANCE. —'Concealment,' in the law of marine insurance, is the failure to disclose any material fact or circumstance in relation to the subject matter of the contract which may increase the liability to loss, or affect the risk or obligation assumed, and which is, in fact or law, within, or ought to be within, the knowledge of one party, and of which the other party has no actual or presumptive knowledge. In the case of marine insurance the insured must disclose all facts material to the risk, and in default of such duty the contract may be avoided by the insurer. In other words, an applicant for marine insurance must state all material facts which are known to him and unknown to the in-

surer. It has been said that the insured is bound to communicate every material fact within his knowledge not known or presumed to be known to the underwriter, whether inquired for or not; and that a failure in either particular, although it may arise from mistake, accident, or forgetfulness, is attended with the rigorous consequences that the policy never attaches and is void, for the reason that the risk assumed is not the one intended to be assumed by the parties.

"The special rules regarding disclosure as to marine insurance do not apply to 'inland marine insurance' policies covering transportation of goods on land."

Although we have found no Texas case expressly applying this rule, there is no indication that the Texas courts have departed from this firmly established principle of marine insurance.[12] Indeed, the only indication is to the contrary. In 24B Texas Jurisprudence, Insurance, (1960), it is said at page 391:

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[12]We are merely assuming here that Texas law is applicable to a defense of concealment raised in connection with a marine insurance policy. There is good reason behind appellant's argument that federal maritime law, rather than state law, governs that issue. Appellant contends, and we agree, that Fireman's Fund Ins. Co. v. Wilburn Boat Co., 348 U.S. 310, merely held that state law is to be applied in the field of marine insurance only where "entrenched federal precedent is lacking" with respect to a specific issue. This is the interpretation which the Supreme Court itself and the Court of Appeals for the Second Circuit has placed on that decision. See Kossick v. United Fruit Co., 365 U.S. 731, 742, and Purolied Down Products Corp. v. Travelers Fire Ins. Co., 2 Cir., 278 F. 2d 439, 441, n. 1. Since the above stated rule of concealment in marine insurance is solidly entrenched in our body of federal maritime law (see e.g., McLanahan v. Universal Insurance Co., 26 U.S. 170, 185), it would seem that this rule should apply in the instant case. Because, however, we believe that the same rule obtains in Texas, this point is of minimal significance to a decision here.

> "It is a concealment when the insured has knowledge of a fact material to the risk which honesty, good faith and fair dealing require that he should communicate to the insurer, but which he withholds.
>
> "With respect to concealment the doctrine applies to all kinds of insurance *but it is much more strictly applied in marine risks . . .*"

This statement then refers the reader to that section of American Jurisprudence quoted above. Under this rule, therefore, the absence of an intent to defraud the insuror would be of no help to the appellees.

The appellant contends, furthermore, that even though the insurance company was required to demonstrate that the appellee had a fraudulent motive and that the insurance company was induced to take action by the concealments and misrepresentations, these elements of common law fraud were proved in this case as a matter of law. We do not here set out the circumstances pointed to by appellant to support this argument because we are firmly convinced that these elements are not required to be shown under the Texas Law. It is not inappropriate to say, however, that the many misrepresentations already related and other circumstances not heretofore detailed do constitute strong evidence of fraud.

In conclusion, because of the clear breach of the warranty against false misrepresentations and concealments, we conclude that the trial court committed error in entering judgment for the appellee.

The judgment is, therefore, REVERSED and the case is

REMANDED to the district court with directions that it enter a judgment for the defendant.

REVERSED and REMANDED.

HUTCHESON, Circuit Judge, Dissenting:

When the parties were first here in 1953[1] and later when they were before the Supreme Court on certiorari,[2] the issues on review were defined by the findings of the late Judge Bryant who heard the cause originally. These were that plaintiffs had violated specified warranties of the marine policy sued on against pledge, sale, and other use than for private pleasure unless, with the insurer's special permission, endorsed on the policy. Judge Bryant ruled: "I don't think any other findings are necessary", inasmuch as he then understood and held that the rule that requires literal performance of warranties was a rule of the general maritime law where a marine policy was concerned which could not be affected by state statutes, and this court, in 201 F92) 833, supra, in principle affirmed this ruling.

On appeal to the United States Supreme Court, 348 U.S. 310, supra, the decision of this court and that of Judge Bryant, to the effect that literal performance as matter of law irrevocably governed the rights of the parties to a marine policy and state statutes could have no effect on that law, were reversed and the cause was remanded to the United States District Court for a trial under appropriate

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[1]Wilburn Boat Co. v. Fireman's Fund Ins. Co., 201 F. (2) 832 (1953)

[2]Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1954)

state law. The majority opinion of the Supreme Court concluded as follows:

> "Under our present system of diverse State regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where Congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been with the States.
>
> "The judgments of the Court of Appeals and the District Court are reversed and the cause is remanded to the District Court for a trial under appropriate state law."

In the light of this opinion, the district judge conducted a complete new trial on the facts and the law, and, in the findings of fact and conclusions of law, set out in his memorandum opinion,[3] dealt fully with all of the issues. Concluding that the contract was a Texas contract and that Texas law controlled, he found and gave judgment for the plaintiff, and this appeal is from that judgment.

The appellant is here taking the same position that it has taken on the prior hearings and appeals, that since the policy in question was a marine policy, general maritime law controlled, a strict and literal compliance was required, and Texas statutes, enacted to mitigate the rigors and the hardships of such strict policy construction, by introducing issues of fact,[4] where there had been only issues of law,

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[3]Willburn Boat Co. v. Fireman's Fund Ins. Co., 199 Fed. Supp. 784.

[4]See "Law and Fact in Insurance Cases", Joseph C. Hutcheson, Jr., Texas Law Review, Vol. XXIII, No. 1.

were without application. Attacking each of the district judge's findings of fact and conclusions of law in plaintiffs' favor, therefore, as without basis in fact and in law. Appellant insists that the judgment must be reversed. The majority opinion completely espouses appellant's views. I cannot accept them.

On the contrary, I am of the clear opinion: that under the controlling decisions, including that of the Supreme Court in this case, the district judge correctly construed and applied the Texas statutes; that his findings of fact are well supported by the evidence of record; and that his legal conclusions are in accord with the controlling law.

The record is a large one, the facts and issues are voluminous. Because, however, of the full, thorough, and accurate way in which the district judge has in his memorandum opinion set the facts out and canvassed and applied the controlling facts and law in the case, it will be sufficient for me to say that I approve, adopt and affirm his findings and conclusions, for the reasons and upon the considerations stated in his opinion. So approving, I respectfully dissent from the opinion and judgment of the majority.

APPENDIX C

WILBURN BOAT COMPANY,
a corporation, Glenn Wilburn, Frank Wilburn and Henry Wilburn, Plaintiffs,
v.
FIREMAN'S FUND INSURANCE COMPANY,
a corporation, Defendant.

Civ. A. No. 503.

UNITED STATES DISTRICT COURT
Eastern Division of Texas
Sherman Division.

July 30, 1960.

SHEEHY, Chief Judge.

The Plaintiffs, Wilburn Boat Company, an Oklahoma corporation, Glenn, Frank and Henry Wilburn, residents and citizens of Grayson County, Texas, instituted this suit in June 1949 seeking to recover from the Defendant Insurance Company, a California corporation, on a policy of insurance issued by the Defendant the sum of $40,000.00 because of the destruction by fire of the motor yacht Wanderer. Unfortunately, this is the third time that this Court has been called upon to determine the rights of the parties hereto.

The case was originally tried before my predecessor without a jury who concluded that the rights of the

parties were to be governed by the general admiralty law, and in view of the fact that Plaintiffs had unquestionably failed to comply with certain provisions of the policy of insurance in question and had violated certain warranties contained in the policy, the Plaintiffs could not recover. The Court of Appeals affirmed the judgment of this Court denying the Plaintiffs a recovery.[1] The Supreme Court granted certiorari and held that the general admiralty law did not apply to the contract of insurance in question, reversed the judgments of the Court of Appeals and of this Court and remanded the case to this Court for trial under appropriate state law without giving any indication whatsoever as to the appropriate state.[2] Upon the case being remanded to this Court, the parties stipulated in writing that the case should be tried solely on the evidence admitted and judicial admissions of fact heretofore made in this Court and on which the original judgment was entered on December 13, 1951. Pursuant to that agreement, this Court, after having studied the lengthy written briefs submitted by the attorneys for the respective parties and after hearing oral argument presented by said attorneys, prepared and filed on May 29, 1957, a rather extensive Memorandum Decision as the Findings of Fact and Conclusions of Law, to which Memorandum Decision reference is here made. Based on those findings and conclusions judgment was entered allowing Plaintiffs a recovery in the amount of $40,000.00 with interest. The holding that Plaintiffs were entitled to recover was founded on a finding and conclusion to the effect

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[1]Wilburn Boat Co., et al. v. Fireman's Fund Ins. Co. (5th Cir.) 201 F.2d 833.

[2]Wilburn Boat Co., et al. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337.

that the insurance policy in question was a Texas contract and in making that finding and conclusion I took judicial notice of the fact that the Defendant had a permit to do and was doing business in the State of Texas in June 1948 and at all other times pertinent hereto. The Defendant appealed from the last mentioned judgment, and the Court of Appeals reversed said judgment and remanded the case to this Court for another trial, and in so doing held that this Court did not have the right to take judicial notice of the fact that the Defendant had a permit to do and was doing business in the State of Texas.[3] The Supreme Court denied Defendant's Petition for Writ of Certiorari.[4] During the November 1959 term this case was again tried before the undersigned without the intervention of a jury, and the facts as found from the evidence introduced at the last mentioned trial are virtually the same as those found and set forth in the Memorandum Decision filed herein on May 29, 1957, and above referred to, and are as hereinafter stated.

At all times pertinent hereto Glenn, Frank and Henry Wilburn, and each of them, were residents and citizens of Denison, Grayson County, Texas, and the H. H. Cleaveland Agency of Rock Island, Illinois, hereinafter referred to as Cleaveland Agency, was a duly authorized agent of the Defendant and was engaged in the writing of insurance, including marine insurance, for the Defendant. On May 22, 1947, the Defendant issued through the Cleaveland Agency its marine hull policy No. YA-28579, the policy in question herein, to Robert D. Marshall, a

[3]Fireman's Fund Ins. Co. v. Wilburn Boat Co., et al. (5th Cir.) 259 F.2d 662.

[4]Fireman's Fund Ins. Co. v. Wilburn Boat Co., et al., 359 U.S. 925, 79 S.Ct. 607, 3 L.Ed. 628.

resident of Rock Island, Illinois, and John Shuler, a resident of Des Moines, Iowa, the then owners of the Wanderer, the yacht or vessel here in question, under the terms of which the Wanderer was insured in the amount of $10,000.00 from loss by fire. At the time such policy of insurance was issued the Wanderer was located in waters at or near Greenville, Mississippi. The policy contained a provision to the effect that it was warranted by the Assured, or the owners of the vessel, that the vessel would be used for private pleasure purposes during the term of the policy and would not be hired or chartered unless permission to so do was granted by endorsement to the policy. Among the conditions of the policy was a provision to the effect that the insurance extended by the policy shall be void in case the policy or the interest insured thereby should be sold, assigned, transferred or pledged without the previous consent of the Defendant. Another pertinent provision of the policy was:

> "This Entire Policy Shall Be Void if the assured has concealed *or* misrepresented any material fact or circumstance concerning this insurance or the subject matter thereof, *or*, in case of any fraud *or* false swearing by the Assured touching any matter relating to this insurance or the subject matter thereof; whether before or after loss."

In June 1948 and for sometime prior thereto and at all other times pertinent hereto the Defendant had a permit to do and was doing business in the State of Texas.

On or about June 4, 1948, and at a time when the coverage of the insurance policy in question had been extended to May 22, 1949, Glenn, Frank and Henry Wilburn purchased the Wanderer from Robert D. Marshall

and John Shuler for a consideration of $9,000.00. As a result of this purchase each of said Wilburns owned an undivided one-third interest in the boat. At that time the Wanderer was still located on waters at or near Greenville, Mississippi. It was the intention of the Wilburns to move said boat from its mooring in Greenville, Mississippi, to Lake Texoma, a large inland lake located near Denison, Texas, with part of said lake being located in Texas and the remainder thereof located in the State of Oklahoma. The Wilburns moved the boat by water from Greenville, Mississippi, up the Mississippi River to the Red River and then up the Red River to the Lake Texoma Dam near Denison, Texas. The boat was then moved overland around the dam and launched on Lake Texoma in July or August 1948 after certain changes and repairs were made to the boat. After the boat was launched on Lake Texoma it was taken to the Texoma Boat and Dock Company, a boat repair business located in Texas on Lake Texoma, where additional extensive repairs and remodeling were performed on the boat. At the time the Wilburns purchased the boat they intended to use it for the carrying of passengers for hire on Lake Texoma.

For some time prior to June 4, 1948, and at all pertinent times subsequent thereto R. L. McKinney of Denison, Texas, owned and operated an insurance agency in Denison, Texas, under the name of R. L. McKinney Agency, writing insurance of various types for various insurance companies he represented. McKinney prior to June 4, 1948, had written various types of insurance for the Wilburns. The Defendant never at any time prior to June 4, 1948, authorized McKinney to solicit or write insurance of any kind for it. At or about the time the Wilburns purchased the Wanderer Frank Wilburn contacted R. L. McKinney

in Denison, Texas, and requested McKinney to obtain for himself and his brothers insurance coverage on the Wanderer. McKinney, who was not authorized to write on behalf of any of the companies he represented the marine insurance the Wilburns desired on the Wanderer, made a telephone call to a representative of the Cleaveland Agency in Rock Island, Illinois. In this telephone conversation McKinney advised the Cleaveland Agency representative, namely, one J. B. White, that he, McKinney, was an insurance agent in Denison, Texas, and was acting as agent for Frank and Henry Wilburn who had purchased the Wanderer; that he, McKinney, had no facilities for writing the hull coverage desired and requested White to arrange with the defendant to continue its coverage of the Wanderer while the boat was being moved from Greenville, Mississippi to Lake Texoma. Representatives of the Cleaveland Agency then contacted the Chicago office of the Defendant and made known to the Defendant the request made by McKinney for the transfer of the coverage of the Wanderer to the Wilburns. The Defendant, through its Chicago office, agreed to transfer the coverage of the policy in question to the Wilburns, and on June 8, 1948, the Cleaveland Agency wired McKinney at Denison, Texas, to the effect that the Defendant was binding the Wanderer with full marine perils coverage and that endorsements would follow. Thereafter, the Defendant issued an endorsement to the policy in question showing that the name of the assured, effective June 8, 1948, was changed from Robert D. Marshall and John Shuler to Frank and Henry Wilburn. This endorsement was transmitted by the Defendant to the Cleaveland Agency who, in turn, forwarded same by mail to McKinney in Denison, Texas.

The premium for the coverage extended the Wilburns on the Wanderer, as aforesaid, was the sum of $419.56. The Wilburns paid this premium by issuing their check drawn on a Denison, Texas, bank payable to the Cleaveland Agency, which check they, in turn, delivered to McKinney who, in turn, transmitted it to the Cleaveland Agency. The Cleaveland Agency then caused the check to be presented for payment, and same was paid by the Denison, Texas, bank upon which it was drawn. By letter dated August 6, 1948, McKinney requested the Cleaveland Agency to endorse the policy of insurance in question so as to show Glenn, Frank and Henry Wilburn, d/b/a Wilburn's Boat Company as the assured. By endorsement dated August 6, 1948, the Defendant so endorsed the policy and such endorsement was forwarded to McKinney at Denison, Texas. On October 4, 1948, Defendant again endorsed the policy because of the fact that the Wilburns had installed a diesel marine engine in the Wanderer and as a result of that were entitled to a return of a portion of the premium previously charged by the Defendant. On December 14, 1948, McKinney addressed a letter to the Cleaveland Agency in which he advised, in effect, that the Wilburn Brothers then had an investment of $40,000.00 in the Wanderer, and that they would like to know what rate would be charged to increase the insurance in question to $40,000.00. On December 20, 1948, the Cleaveland Agency wired McKinney the amount the $30,000.00 additional insurance would cost. By letter dated December 21, 1948, McKinney requested the Cleaveland Agency to increase the coverage of the policy in question by $30,000.00. The Defendant, upon being advised by the Cleaveland Agency of such request for additional insurance, caused such additional in-

surance to be issued by endorsement to the policy in question effective December 30, 1948, as a result of which the coverage of the policy in question was increased to $40,000.00.[5] This endorsement was forwarded by the Cleaveland Agency to McKinney at Denison, Texas, by letter dated December 20, 1949. The policy of insurance in question and each and every endorsement thereto, and above mentioned, was delivered by the Cleaveland Agency through the United States mails to McKinney at Denison, Texas, and, in turn, delivered by McKinney to the Wilburns in Denison, Texas, prior to February 25, 1949. At the time the Defendant agreed to transfer the policy of insurance in question to the Wilburns and at all times subsequent thereto it knew that Glenn, Frank and Henry Wilburn, and each of them, resided in Denison, Texas.

On December 28, 1948, the Defendant's Chicago office wrote the Cleaveland Agency and stated, in effect, that in view of the substantial increase in the coverage they had extended the Wanderer, the Wilburns should have a competent marine surveyor inspect the Wanderer and furnish the Defendant with the surveyor's estimate of its present day value or, in the event a surveyor was not available, a new completed yacht application, together with bills and invoices for the work and for the new installations completed, should be furnished. By letter dated January 25, 1949, addressed to McKinney, the Cleaveland Agency advised McKinney of the Defendant's request that the

[5]This endorsement provided in part as follows: "In consideration of an additional premium of $234.01 it is understood and agreed that the amount of insurance hereunder is increased to $40,000.00. It is further understood and agreed that the said vessel, for so much as concerns the Assured by agreement between the assured and Assurer in this Policy is, and shall be valued at $40,000.00."

Wilburns have a competent marine surveyor inspect the vessel and forward to McKinney an application form or blank to be used in making the report of the surveyor's inspection. McKinney made the survey of the Wanderer and the application and survey form furnished McKinney by the Cleaveland Agency, as aforesaid, was completed by McKinney, signed by J. F. (Frank) Wilburn, and transmitted by McKinney to the Cleaveland Agency. The Cleaveland Agency on February 9, 1949, forwarded said completed application and survey report to the Defendant's Chicago office. The application and survey report showed the owners of the Wanderer to be the Wilburn brothers of Denison, Texas; that the cost of the vessel to the Wilburn brothers was $30,000.00 plus $10,000.00 for engine, lighting and fire fighting equipment; that the estimated market value of the vessel was $40,000.00; that the vessel was not subject to any mortgage or other encumbrance; that the water to be navigated by the vessel was Lake Texoma, north of Denison, Texas; that the vessel is used for commercial purposes; that the vessel is chartered; that the summer location of the vessel is Burns Run Resort, Lake Texoma; and that the winter location of the vessel is Lake Texoma Boat & Dock Company. The application and survey report contained additional information descriptive of the vessel, its engines and rigging. Neither this application and survey report nor a copy thereof nor any other statement nor copy thereof made by the Wilburns in connection with the obtaining of the insurance coverage in question was ever attached to the policy in question. The Defendant, after receiving the application and survey report on or about February 9, 1949, took no further action with reference to the policy prior to the destruction of the Wanderer by fire with the exception

of receiving from the Cleaveland Agency a copy of an endorsement to the policy dated October 4, 1948, signed by the Wilburns and showing the replacement of the gasoline engine of the Wanderer with a diesel engine, which endorsement was forwarded to Defendant's Chicago office by letter of the Cleaveland Agency dated February 11, 1949.

On February 25, 1949, the Wanderer was completely destroyed by fire while it was moored to a buoy in Lake Texoma approximately 300 feet from the shore and in the vicinity of Burns Run Resort, which resort is located on the Oklahoma shore line of Lake Texoma. The place where the Wanderer was moored at the time of its destruction by fire is located in the State of Oklahoma.

The Wanderer was not used solely for private pleasure purposes during its ownership by the Plaintiffs, but on the contrary said boat was purchased by the Wilburns with the intention of being chartered and used for hire, was remodeled and re-equipped for such purposes, and to the extent that patronage was available, was chartered and used for hire from the time of its acquisition by the Wilburns until its destruction by fire. However, during that time the boat was only used for hire three or four times. During January 1949 the boat was damaged as the result of a storm. It was then taken from its regular mooring at Burns Run Resort to Lake Texoma Boat and Dock Company for repairs and remained at Lake Texoma Boat and Dock Company undergoing repairs until three or four days before February 25, 1949, at which time it was returned to its regular mooring at Burns Run Resort. Lake Texoma Boat and Dock Company is located in Texas on the Texas shore of Lake Texoma. From the time the boat was damaged by storm in January 1949 up to its destruction by fire on February 25, 1949, it was not used for commercial

purposes of any nature and was not used for any purpose except being returned to Burns Run Resort a few days before February 25, 1949, as aforesaid.

In July 1948 Glenn, Frank and Henry Wilburn caused a corporation, known as the Wilburn Boat Company, to be formed under and by virtue of the laws of the State of Oklahoma. The capital stock of this corporation was shown to be $40,000 and the sole and only asset the corporation ever had was the Wanderer, title to which was transferred to it as hereinafter pointed out. All of the stock of the Wilburn Boat Company was owned at all times by Glenn, Frank and Henry Wilburn. The corporation, Wilburn Boat Company, never at any time had a permit to do business in the State of Texas.

In June 1948 the Plaintiffs, Glenn, Frank and Henry Wilburn, borrowed $10,000.00 from the Citizen National Bank of Denison, Texas, and on August 4, 1948, Wilburn Brothers Boat Company, acting by and through Frank and Henry Wilburn, borrowed an additional $10,000.00 from said bank. On the last mentioned date said Wilburn Brothers Boat Company, acting by and through Frank and Henry Wilburn, executed a chattel mortgage covering the Wanderer in favor of the bank to secure the payment of the $20,000.00 borrowed from the bank. On September 24, 1948, by bill of sale of that date, Glenn, Frank and Henry Wilburn transferred the Wanderer to the Plaintiff, Wilburn Boat Company, a corporation, reciting a consideration of $9,000.00. On October 25, 1948, Wilburn Boat Company, a corporation, executed a promissory note in favor of Frank and Henry Wilburn in the amount of $8,000.00, and on the same date said corporation executed a chattel mortgage covering the Wanderer to secure the payment of said $8,000.00. The sale of the boat to the Wilburn Boat Com-

pany, a corporation, and the mortgaging of said boat to the Citizens National Bank of Denison and to Frank and Henry Wilburn, as aforesaid, were done without the consent of the Defendant. At the time the Wanderer was destroyed by fire the indebtedness of $20,000.00 to the Citizens National Bank of Denison and the indebtedness of the Wilburn Boat Company, a corporation, to Frank and Henry Wilburn in the amount of $8,000.00, above mentioned, were unpaid and the chattel mortgages, above mentioned, had not been released.

Immediately upon the Wanderer being destroyed by fire, the Plaintiffs notified McKinney and McKinney, in turn, advised the Cleaveland Agency by telegram on February 25, 1949, of the destruction of said boat by fire. The Cleaveland Agency promptly advised the Defendant's Chicago office of the destruction of the boat. The Plaintiffs, by letter dated March 3, 1949, addressed to the Defendant and to the Cleaveland Agency, forwarded the Defendant a sworn statement of proof of loss covering the loss of the Wanderer. On May 12, 1949, the Defendant, by letter to the Plaintiffs, returned to Plaintiffs the sworn statement of the proof of loss previously submitted by the Plaintiffs and denied liability to the Plaintiffs for the loss and returned to Plaintiffs the premiums Plaintiffs had previously paid the Defendant on the policy in question. The Plaintiffs refused to accept the premiums so returned. In said letter of May 12 it was stated, in effect, that the Defendant was denying liability because: (a) of the sale of the Wanderer by Glenn, Frank and Henry Wilburn to Wilburn Boat Company; (b) of the mortgaging or pledging of said boat by the Plaintiffs; (c) the Plaintiffs did not have an investment of $40,000.00 in the boat; and

(d) the boat had been used for commercial purposes and had not been used for pleasure purposes.

It is as difficult to determine with any degree of accuracy the amount of money the Wilburns had invested in the Wanderer at the time of its destruction from the record made at the last trial as it was to determine such from the record made at the first trial. However, the record establishes, and I so find, that without placing a value on the time and effort spent by the three Wilburn brothers in connection with the remodeling or rebuilding of the Wanderer the Wilburns had substantially less than $40,000.00 invested in the boat. Notwithstanding the fact that the Wilburns had invested in the Wanderer a sum less than $40,000.00, I find from the evidence that the fair cash market value of the Wanderer immediately prior to its destruction was $40,000.00.

[1] The Defendant in asserting a system of fluid defenses contends that the Plaintiffs cannot recover because the Plaintiffs violated the contract of insurance in question in one or more of the following particulars: (1) by using the Wanderer for commercial purposes, i.e., the transporting of passengers for hire and the chartering of the vessel in violation of the warranties contained in the policy to the effect that the vessel would be used only for private purposes; (2) by the pledging or mortgaging of the Wanderer as above set forth; (3) by the sale of the Wanderer by the Wilburn brothers to the Wilburn Boat Company, a corporation; (4) by making certain fraudulent misrepresentations to the Defendant, namely, that they had $40,000.00 invested in the Wanderer, that the boat was not mortgaged, that the Wilburn brothers were the owners of the boat and that the winter location of the Wanderer was at the Texoma Boat and Dock Company; and (5) by con-

cealing from the Defendant certain facts, namely, the transfer of ownership of the Wanderer from the Wilburn brothers to the Wilburn Boat Company, a corporation, the true amount Plaintiffs had invested in the Wanderer, the pledging or mortgaging of the boat and the fact that the boat was being used for commercial purposes. The Plaintiffs contend that the insurance policy in question as between them and the Defendant is a Texas contract to be governed by the laws of Texas, and under such laws none of the defenses asserted by the Defendant constitutes a defense to Plaintiffs' action. Plaintiffs also contend that R. L. McKinney as to his actions as to the insurance policy in question was the agent and representative of the Defendant. On the other hand, the Defendant contends that McKinney as to such actions was the agent and representative of the Plaintiffs. As to these contentions, I find and conclude that McKinney was not the agent or representative of the Defendant but as to his dealings with reference to the insurance policy in question was the agent or representative of the Plaintiffs. Under the facts in this case McKinney would be the agent of the Defendant only if the provisions of Art. 5056, Revised Civil Statutes of Texas, 1925 (now Art. 21.02 of the Texas Insurance Code, V.A.T.S.) made him such. Said statute as construed by the courts did not make McKinney the agent or representative of the Defendant.[6]

[2] Was the policy in question as between the Plaintiffs and Defendant a Texas contract with the rights of

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[6]Hartford Fire Ins. Co. v. Walker, 94 Tex. 473, 61 S.W. 711; Taylor v. United States Fidelity & Guaranty Co. (Tex.Com.App.) 283 S.W. 161; Camden Fire Ins. Co. v. Hill (Tex.Com.App.) 276 S.W. 887; Simmons v. Western Assurance Co. (5th Cir.) 205 F.2d 815, 821; and Maryland Casualty Co. v. Seay (5th Cir.) 56 F.2d 322, 324.

the parties thereto to be governed by Texas law? When the base policy was originally issued by the Defendant to Marshall and Shuler, it, of course, was not a Texas contract. However, when the Defendant agreed to transfer the coverage of said policy from Marshall and Shuler to the Wilburn brothers and issued the endorsement to the policy, effective June 8, 1948, which is hereinabove referred to, a new contract of insurance was, in effect, made and entered into between the Defendant and the Wilburns, and it is this contract under which the rights of the parties hereto must be determined. Art. 5068, R.C.S. of Texas, 1925 (now Art. 2143, Texas Insurance Code) provides, in effect, that the provisions of the statutes of Texas relating to insurance are conditions upon which foreign insurance corporations (such as the Defendant) shall be permitted to do business within the State of Texas and that any such foreign corporations engaged in issuing contracts or policies within the State of Texas shall be held to have assented to said laws relating to insurance as a condition precedent to its right to engage in such business within the State of Texas. Art. 5054 of the R.C.S. of Texas, 1925 (now Art. 21.42, Texas Insurance Code) provides: "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same." The contract of insurance in question from and after June 8,

1948, was payable to citizens and inhabitants of the State of Texas by the Defendant, an insurance company, doing business within the State of Texas on June 8, 1948, and at all other times pertinent hereto. Thus under the express provisions of the last mentioned statute the contract of insurance in question between the Plaintiffs and the Defendant is a Texas contract covered by the laws of Texas relating to insurance, and Defendant's contention to the contrary is wholly without merit.

[3] As above indicated, the Defendant contends that Plaintiffs' use of the Wanderer commercially was a breach of the warranty contained in the policy to the effect that the boat would be used only for private use and that because of such breach the Plaintiffs cannot recover. Art. 4930, R.C.S. of Texas, 1925, (now Art. 6.14, Texas Insurance Code) provides, in effect, that no breach or violation by the insured of any warranty condition or provision of any fire insurance policy or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property. It is obvious from the evidence in this case that Plaintiffs' use of the Wanderer commercially had nothing whatsoever to do with its destruction by fire. That being true, Plaintiffs' breach of the warranty to the effect that the Wanderer would be used only for private use, under the provisions of said Art. 4930 and the construction of that statute given by the courts of the State of Texas, is not available to the Defendant as a defense.[7]

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[7] McPherson v. Camden Fire Ins. Co. (Tex.Com.App.) 222 S.W. 211; Citizens State Bank of Dickinson, Texas v. American Fire & Casualty Co. (5th Cir.) 198 F.2d 57-59; Holston v. Implement

[4] Among the conditions of the policy in question was a provision to the effect that the coverage of the policy would be voided in case the property covered thereby was pledged without the consent of the Defendant. As above indicated, the Plaintiffs executed chattel mortgages covering the Wanderer to secure debts of the Plaintiffs without the consent of the Defendant, but the contention of the Defendant to the effect the policy was voided by the actions of the Plaintiffs in executing such chattel mortgages is without merit because under the express provisions of Art. 4890, R.C.S. of Texas, 1925 (now Art. 5.37, Texas Insurance Code) the anti-pledge provisions of the policy are void and of no force and effect.

[5] As hereinbefore pointed out, the policy provided, in effect, that the insurance afforded by said policy shall be void in the event the policy or the *interest* insured thereby shall be sold, assigned or transferred without the previous consent of the Defendant. Unquestionably, the Wilburn brothers, the sole owners of the Wanderer, sold and transferred same to the Wilburn Brothers Company, a corporation, all the stock which was owned solely by the Wilburn brothers, without the consent of the Defendant. Was this such a sale or transfer of the *interest* insured as would void the coverage of the policy and relieve the Defendant from liability to the Plaintiffs for the loss in question? It should be borne in mind that the policy provision just mentioned did not refer to the transfer, assignment or sale of "title." It referred only to the sale, assignment or transfer of the "interest" in-

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Dealers' Mutual Fire Ins. Co. (5th Cir.) 206 F.2d 682, 685; Trinity Universal Ins. Co. v. Daniel (Tex.Civ.App.) 202 S.W.2d 266; and Springfield Fire & Marine Ins. Co. v. K. M. A. Fuel Oil Co. (Tex.Civ.App.) 78 S.W.2d 1053.

sured. Under the law of Texas the Wilburn brothers, after the transfer of the Wanderer to the corporation, were the beneficial owners of the Wanderer, and such transfer of the Wanderer to the corporation did not void the coverage of the policy,[8] and this is particularly true since the beneficial interest of the Wilburn brothers in the boat after the transfer of it to the corporation was not of a nature as would be calculated to increase the motive to burn the boat or diminish the motive to guard the property from loss by fire.

Defendant, relying on the provisions of the policy in question above quoted to the effect that concealments or misrepresentations of material facts by the assured will void the policy, contends that the Plaintiffs fraudulently concealed and fraudulently misrepresented certain material facts. The misrepresensations charged by the Defendant are that Plaintiffs misrepresented (1) that they had $40,000.00 invested in the Wanderer; (2) that the Wanderer was not mortgaged or pledged; (3) that the Wilburn brothers were the owners of the boat; and (4) that the winter location of the Wanderer was at the Texoma Boat and Dock Company. The concealments charged by the Defendant are that the Plaintiffs concealed from the Defendant (1) the transfer of the ownership of the Wanderer from the Wilburn brothers to the Wilburn Boat Company, a corporation; (2) the true amount of money Plaintiffs had invested in the Wanderer; (3) the pledging or mortgaging by the Plaintiffs of the Wanderer;

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[8]Pacific Fire Ins. Co. v. John E. Morris Co. (Tex.Com.App.) 12 S.W.2d 971; Aransas Pass Harbor Co. v. Manning, 91 Tex. 558, 63 S.W. 627, 629; and Insurance Co. of North America v. O'Bannon, 109 Tex. 281, 206 S.W. 814, 1 A.L.R. 1407.

and (4) the fact that the boat was being used for commercial purposes.[9]

There is not the slightest evidence that any one or more of the matters concerning which Plaintiffs made misrepresentations as charged by the Defendant or any of the matters concealed by the Plaintiffs as charged by the Defendant in any manner contributed to bring about the destruction of the Wanderer by fire, and for that reason it might well be said that, under the provisions of Art. 4930, Revised Civil Statutes of Texas, 1925 (now Art. 6.14, Texas Insurance Code) and the holdings of the courts in the cases construing that statute cited in Footnote 7, supra, Defendant's defenses based upon fraudulent misrepresentations and concealments on the part of Plaintiffs are without merit. But, be that as it may, there are other reasons why said asserted defenses are without merit.

[6] It is the settled law in Texas that an insurer seeking to avoid a policy, such as the one in question, because of misrepresentations must plead and prove not only that a fraudulent misrepresentation was made by the insured but must plead and prove that the misrepresentation was as to a material fact and such misrepresentation was made by the insured with the intention to deceive the insurer and induce it to issue the policy in question.[10] A similar rule applies to concealments, i.e., the burden is on the in-

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[9]As previously pointed out in this opinion, the Defendant had actual notice of Plaintiffs' use or intended use of the Wanderer for commercial purposes prior to the date of the loss in question, namely, on or about February 9, 1949.

[10]Clark v. National Life & Accident Ins. Co., 145 Tex. 575, 200 S.W.2d 820; Great Southern Life Ins. Co. v. Doyle, 136 Tex. 377, 151 S.W.2d 197; Roosth v. Lincoln National Life Ins. Co. (5th Cir.) 269 F.2d 171; and Lumbermens Mutual Casualty Co. v. Klotz (5th Cir.) 251 F.2d 199.

surer to prove that the fact or facts concealed were not only material but that the insurer intentionally withheld or concealed from the insurer such facts.[11]

[7] After a careful consideration of the evidence in this case, I find and conclude that none of the misrepresentations charged by the Defendant against the Plaintiffs was as to a material fact and none of the concealments charged against the Plaintiffs by the Defendant was as to a material fact. Furthermore, I find and conclude that the evidence fails to establish that any of the misrepresentations charged by the Defendant as having been made by the Plaintiffs or their agent, R. L. McKinney, was made by the Plaintiffs, or any of them, or R. L. McKinney, with the intention to deceive the Defendant and induce it to issue the policy in question, and I find and conclude that the evidence fails to establish that the Plaintiffs, or either of them, or R. L. McKinney designedly and intentionally concealed any of the facts from the Defendant that the Defendant charges as concealments on the part of the Plaintiffs.

In light of the findings and conclusions hereinabove made, it follows that Plaintiffs are entitled to recover from the Defendant the sum of $40,000.00, with interest thereon at the rate of six (6%) per cent per annum from May 12, 1949, the date Defendant denied liability to Plaintiffs for the loss in question and their costs incurred in this Court. Judgment to that effect will be entered.

This Memorandum Decision will constitute the Findings of Fact and Conclusions of Law herein as authorized by Rule 52, F.R. Civ. P., 28 U.S.C.A.

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[11]Hanover Fire Ins. Co. v. Nash (Tex.Civ.App.) 67 S.W.2d 452, 454 (Writ of Error Refused).

APPENDIX *D*

Applicable Texas Statutory Law

Vernon's Texas Revised Civil Statutes of 1936, Article 5054, now Article 21.42, Texas Insurance Code of 1951, Vol. 14, Vernon's Texas Civil Statutes, Page 707, entitled, *Texas Laws Govern Policies.*

> "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby; notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same."

Vernon's Texas Revised Civil Statutes of 1936, Article 5068, now Article 21.43, Texas Insurance Code of 1951, Vol. 14, Vernon's Texas Civil Statutes, Page 770, entitled, *Foreign Insurance Corporations.*

> "The provisions of this code are conditions upon which foreign insurance corporations shall be permitted to do business within this State, and any such foreign corporation engaged in issuing contracts or policies within this State shall be held to have assented thereto as a condition precedent to its right to engage in such business within this State."

Vernon's Texas Revised Civil Statutes of 1936, Article 5043, now Article 21.16, Texas Insurance Code of 1951,

Vol. 14, Vernon's Texas Civil Statutes, Page 617, entitled, *Misrepresentation by Policyholder.*

> "Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case."

Vernon's Texas Revised Civil Statutes of 1936, Article 5049, now Article 21.35, Texas Insurance Code of 1951, Vol. 14, Vernon's Texas Civil Statutes, Page 696, entitled, *Policies and Applications.*

> "Except as otherwise provided in this code, every contract or policy of insurance issued or contracted for in this State shall be accompanied by a written, photographic or printed copy of the application for such insurance policy or contract, as well as a copy of all questions asked and answers given thereto. . . ."

Vernon's Texas Revised Civil Statutes of 1936, Article 4890, now Article 5.37, Texas Insurance Code, Vol. 14, Vernon's Texas Civil Statutes, Page 197, entitled, *Lien on Insured Property.*

> "Any provision in any policy of insurance issued by any company subject to the provisions of this sub-

chapter to the effect that if said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character, then such encumberance shall render such policy void, shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void.'

Vernon's Texas Revised Civil Statutes of 1936, Article 4930, now Article 6.14, Texas Insurance Code of 1951, Vol. 14, Vernon's Texas Civil Statutes, Page 245, entitled, *Breach by Insured.*

"No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or applications therefore, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

APPENDIX E

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 18840

C. A. VERNON and MARIANNE VERNON,
Appellants,

versus

AETNA INSURANCE COMPANY, Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(March 30, 1962)

Before TUTTLE, Chief Judge, and HUTCHESON and RIVES, Circuit Judges.

HUTCHESON, Circuit Judge: The case is before us upon appeal from a summary judgment rendered in behalf of the insurer, appellee here, in an action by the insured on a personal property floater policy of insurance. As a statement of the facts of the case will show, this is another of those all too numerous instances of the mis-use of the summary judgment procedure to cut a trial short; as so often before, it has served only to prove that short-cutting

of trials is not an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through.[1]

Among the articles of property covered by the policy were certain scheduled pieces of jewelry of the value of $49,150.00. Appellants stated in their original petition that on or about January 17, 1960, some of the jewelry, valued at $27,700.00, was taken from their home under circumstances constituting burglary or theft. Aetna, the insurer, was made aware somehow;[2] that the insured claimed the right to recovery for a covered loss, and denied liability because, according to appellants' petition, of Aetna's stated belief "that plaintiffs were liars and frauds". Appellants then instituted suit in a district court of Texas for the amount of the alleged loss and punitive damages. The suit was removed on petition of the insurer to the United States District Court for the Southern District of Texas.

On May 20, 1960, before Aetna had filed its answer in the suit, Marianne Vernon, one of the plaintiffs-appellants and owner of most of the jewelry, subscribed and swore to a statement in which she declared that the burglary or theft of jewelry which was the basis of her claim against Aetna was in fact feigned by her father, C. A. Vernon, the other appellant herein, pursuant to a plan for obtaining

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[1]Gray Tool Co. v. Humble Oil & Refining Co., 186 F. (2) 365. Cf. Colby v. Klune, 178 F (2) 872; Doehler Metal Furn. Co. v. U. S., 149 F (2) 130 at 135; Kennedy v. Silas Mason, 334 U.S. 249 at pp. 256-7; Sartor v. Ark. Natural Gas Corp., 321 U.S. 620 at p. 627; Peckham v. Ronrico, 171 F (2) 653 at p. 657; Whitaker v. Coleman, 115 F (2) 305.

[2]Appellants claim that the proofs of loss required by the policy were filed within the time limits therefor; appellee claims that they were not. The truth of the matter is not in issue on this appeal.

a recovery on the policy, to which she, her mother, and her father were all parties.

On May 23, 1960, Aetna filed its answer, relying affirmatively on the defense that a clause in the policy provided:

> "This policy shall be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

and that the action of C. A. Vernon, Marianne Vernon, and Mrs. C. A. Vernon, as described in Marianne Vernon's statement of May 20, 1960, was a clear violation of this clause, voiding the contract. In addition, Aetna filed a counterclaim for actual and punitive damages.

Thereafter, on September 8, 1960, Aetna moved for partial summary judgment, with Marianne Vernon's affidavit of May 20, 1960 attached, on the ground that the Vernon's fraud vitiated the insurance and released the liability of the insurer as a matter of law. On October 17, 1960, no controverting affidavits having been filed, the motion was set for hearing on October 31st. Prior to the date set for hearing, however, on October 28th, C. A. Vernon, his wife, and Marianne Vernon all executed affidavits repudiating Marianne's affidavit and denying knowledge of, or complicity in, the theft of the insured jewelry as sworn to by her. In repudiating her statement of May 20, 1960, Marianne Vernon stated:

> "I have read the statement made and executed by me on May 20, 1960. The representations in that statement regarding the theft of jewelry from

our house are not true. I had no prior knowledge of the theft, was not in anyway implicated, and I do not know the whereabouts of the jewelry.

"I was induced to make and sign this statement out of fear for the liberty of Mark Tenalio." [This man had been employed by investigators representing the insurer to make inquiries in Bryan, Texas, where the Vernons lived] "At the time I made the statement I was deeply in love with Mark Tenalio. He had asked me to marry him and I was pregnant by him. He told me that if I did not 'help to clear him' he would go to the penitentiary for this theft. I did not want the father of my unborn child to be a convict, so, together we invented this story about my father and mother. It is all false."[3]

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[3]Subsequent to the rendition of judgment in this case, Marianne Vernon was charged by complaint with perjury in connection with her statement of October 28, 1960. Upon a hearing before the United States Commissioner, it appeared that the notary who signed Marianne Vernon's statement in his official capacity had no independent recollection of the statement, and that while he did not usually require an affiant to raise his or her hand and swear, it was his custom to determine if the affiant has read the statement and to ask the affiant if the statement is true. The complaint was dismissed on motion of the United States.

As to appellee's contention that Marianne Vernon's second statement did not constitute an affidavit, and was, therefore, insufficient to raise issues of fact in defense of a motion for summary judgment, if it be assumed, without deciding, that a statement not made under the pains and penalties of perjury under Texas law would be inadequate to raise issues of fact in defense of a motion for summary judgment, this would not avail appellee, for the showing made before the Commissioner in the case at bar was not, in our opinion, sufficient to impair the technical validity of the statement as an affidavit. See Vaughan v. State, 177 SW (2) 59 (Tex. Crim. App. 1943) **reh. denied.**

On October 31, 1960, a hearing on Aetna's partial motion for summary judgment was held. At this time the court had before it all of the affidavits referred to above. After stating that the affidavits raised material issues of fact, and announcing that the motion for summary judgment would be overruled, the court granted Aetna leave to file an amended motion. The amended motion abandoned the motion for partial summary judgment made in connection with the Aetna's counter claim, set up the policy provision voiding the policy in the event of fraud, attempted fraud, or false swearing by the insured, and the two affidavits executed by Marianne Vernon, and urged that since one of the affidavits must necessarily be false, the policy provision was violated and the policy voided.

Finding that the two affidavits given by Marianne Vernon established fraud, attempted fraud, false swearing, concealment and misrepresentation, as a matter of law, the district court rendered judgment for Aetna. The published opinion may be found at 189 F. Supp. 233.

Appellee was entitled to judgment on its motion only if there were no genuine issues as to any material fact and if the uncontroverted facts established its right to judgment as a matter of law. Fed. R. Civ. P. 56(c). State law is controlling, and the question we must decide is whether, under the law of Texas a provision in a policy of insurance purporting to void the policy in the event of fraud, attempted fraud, or false swearing by the insured may be invoked as the basis for a summary judgment when the insured executes two affidavits of the character of those involved in the instant case by taking one or both as false. Aetna urges both that the policy provision in question should be construed to require that, because of the making of two

affidavits, the policy be voided, and that this result is not contrary to Texas law. We shall examine both of these propositions.

The Texas Insurance Code (Acts 1951, 52nd Leg. ch. 491), Art. 21.16 provides that any provision in a policy which provides that untrue or false answers or statements made in the application or contract shall render the policy void shall not constitute a defense to a suit on the policy unless it is shown upon trial that the matter or thing represented was material to the risk or actually contributed to the contingency or event upon which the policy became payable. Materiality is a question of fact. Article 21.19 provides that a provision voiding a policy for false statements made in the proofs of loss shall be ineffective as a defense unless it is shown upon trial that the false statement was fraudulently made, misrepresented a fact material to the liability of the insurer, and that the insurer was thereby misled and caused to waive or lose some valid defense to the policy. It will be observed that the foregoing statutory provisions apply by their terms only to false statements made in the application for the policy or in the proofs of loss, respectively. So far as we have been able to determine, no Texas statute or decision deals directly with the question of avoidance of a policy because of false statements made subsequent to the institution of suit upon the policy, after denial of liability by the insurer. The statutory provisions referred to above do, however, bespeak the public policy of Texas in insurance matters. Part of a comprehensive Insurance Code and remedial in nature, they are to be construed liberally to accomplish the legislative purpose, with the evil to be remedied kept clearly in view. *Mecca Fire Ins. Co. v. Strickler*, 156 S.W. 353 (Civ. App. 1911), no

writ history; *McPherson v. Camden Fire Ins. Co.*, 222 S.W. 211 (Comm. App. 1920).

The policy plainly revealed by these provisions is one flatly opposed to the use of forfeiture clauses to avoid the obligations of insurance contracts solely upon a showing that the insured has made, at any time, a false statement with respect to the insurance or the subject thereof. Under the statutory scheme, only those falsehoods which are material to the risk, if made before the loss occurs, and only those which are material, fraudulently made, and which mislead the insurer and cause it to lose some valid defense, if made after the loss occurs, may be made the basis for voiding a policy pursuant to a forfeiture clause.

To be sure, the Legislature, in expressing its policy, referred specifically to only two kinds of false statements, those in the application and those in the proofs of loss. The reason for this is apparent. These are the only kinds of statements, in the vast majority of cases, which the insured will ever make to the insurer, and are by far the most important which can be made, for the former serves to provide the information upon which the insurer determines to accept or refuse the risk, and the latter notifies the insurer of the occurrence of the risk insured against and the circumstances surrounding it. The Legislature having specifically prohibited the forfeiture of policies because of falsity (unless the insurer can demonstrate existence of the statutory prerequisites to voiding the policy) in even those communications with the insurer upon which the latter might ordinarily be expected to rely most, it follows that false statements of lesser consequence, such as the affidavits in this case, though not specified in the statute are nonetheless included within the same prohibition.

Chaachou v. American Central Insurance Company, 241 F (2) 889 (5th Cir. 1957) is not authority to the contrary. Explicitly predicated upon "the absence of statute, E.g., Art. 21.19, Texas Insurance Code, V.A.T.S.", that case was decided under the law of Florida. It dealt with false statements made in the proofs of loss and was a case in which fact questions regarding the statements had been submitted to a jury, rather than, as here, taken as undisputed.

We turn next to examination of the contract provision upon which Aetna relies in its effort to avoid the policy. In doing so, we are not unmindful of the principle that policies are to be construed most strongly against the insurer and so as to avoid a forfeiture, if possible. *Burns v. American National Ins. Co.*, 280 S.W. 762 (Comm. App. 1926); *Kelly v. American Ins. Co.*, 316 S.W. (2) 452, aff'd 325 S.W. (2) 30, *reh. den.* The plain meaning of the words of the provision taken in their broadest possible scope, is that any falsely sworn statements by the insured, made at *any* time, under *any* circumstances, to *any* person or entity is sufficient to void the policy. While the provision was obviously inserted for the sole benefit of the insurer, who now naturally contends for a literal interpretation, it must be remembered that it is a contract which we are here considering, not a fiat. We are unconvinced that any insured would agree to the construction contended for by Aetna. Under that construction, the slightest falsehood by the insured, even in a sworn pleading or upon the witness stand in a court of law, no matter how immaterial, no matter how innocent the insured, no matter how well-known the truth to the insurer, so long as it related to the insurance or the subject thereof, would summarily void the policy as a matter of law. It is absurd to suggest that any insured would knowingly assent to

such a provision. Yet the false statements here complained of were made, not to the insurer, as it appears, but for the purposes of this litigation, almost as if the insured had indeed pleaded them or made them upon the witness stand as in the hypothetical situation just suggested. We find quite convincing the construction placed on such contractual provisions by authorities which have held that such provisions do not extend to false swearing after suit is instituted on the policy. See *American Paint Service v. Home Insurance Co. of New York*, 246 F (2) (3rd Cir. 1957); *Deitz v. Providence Washington Ins. Co.*, 33 W. Va. 526 (1890).

Moreover, as we have indicated, construed as the appellee urges, the provision in question would be invalid and void as contrary to the public policy of Texas.

We conclude that the provision does not extend to every false swearing, but only to those within the scope allowed by the public policy of the state. It does not extend to the affidavits made by Marianne Vernon after denial of liability by Aetna and after action on the policy had commenced.

It is apparent from what we have said, that the mere fact of making inconsistent statements does not establish fraud or attempted fraud under the policy as a matter of law and that fact questions remain for decision before the insurer may prevail upon those defenses.

The trial court erred in rendering summary judgment. The judgment is therefore REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

Dissenting Opinion of Chief Judge Tuttle omitted.